No. [redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

COLORADO INTERSTATE GAS COMPANY,
a Corporation, *Appellant*,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

Appellant appeals from two final judgments of the Supreme Court of Kansas. Such judgments upheld as a valid exercise of State regulatory authority, orders issued by the Kansas State Corporation Commission under the guise of conservation, the prevention of waste and the protection of correlative rights, but which had the operative effect of regulating Appellant's purchases of gas for transportation and sale in interstate commerce for resale. The appeals involve identical or closely re-

lated questions and Appellant is therefore filing a single jurisdictional statement covering both such appeals in accordance with Rule 15, paragraph 3 of the Rules of this Court.

OPINIONS BELOW

There are two opinions of the Kansas Supreme Court which form the basis of the two appeals hereinbefore mentioned. The first opinion is reported at 192 Kan. 1, 386 P.2d 266; such opinion is attached hereto as Appendix A. The second opinion is reported at 192 Kan. 29, 386 P.2d 288; such opinion is attached hereto as Appendix B. Such opinions and the judgments of the Kansas Supreme Court were filed on November 2, 1963. Appellart filed timely motions for rehearing relating to both such judgments, which motions were overruled by the Kansas Supreme Court on January 3, 1964.

The appeals to the Kansas Supreme Court were from judgments either of the District Court of Finney County, Kansas, or the District Court of Stevens County, Kansas. Neither Court rendered an opinion. The judgments entered by such Courts are contained in Appendix C attached hereto.

The controversy involved 34 orders of the Kansas State Corporation Commission entered beginning April, 1956, through January, 1959, in the first appeal; and 7 orders, from October, 1959, through March, 1960, in the second appeal. All the orders and all of the appeals involved essentially the same question, the two sets of appeals being necessary because of a change in the Kansas Gas Conservation Act. The Commission first entered interim orders. One of such orders is attached hereto as

Appendix D. It is representative of all other interim orders.

The Commission entered one general order effective February 1, 1958. Such order is attached hereto as Appendix E.

The Commission entered thereafter orders for each propration period of six months. One such order, illustrative of all such orders, is attached hereto as Appendix F.

Pursuant to such six months' orders the Commission entered proration orders each month. One of such orders illustrative of all of the others is attached hereto as Appendix G.

None of such Commission orders are reported.

JURISDICTION

Appellant filed petitions for judicial review in the District Court of Finney County, Kansas under pertinent Kansas statutes, seeking to set aside the orders of the Kansas State Corporation Commission on grounds, among others, that they violated the Commerce Clause of the United States Constitution and the exclusive jurisdiction granted the Federal Power Commission by virtue of the Natural Gas Act. Appellant persisted in its assertions made to the Corporation Commission that such Commission's orders were not actually proration orders made to conserve a natural resource and to protect correlative rights in the Kansas portion of the Hugoton gas field but were actually orders seeking to influence and control Appellant's purchases of gas for transportation in interstate commerce for resale. Such Federal questions were preserved in appeals from the District Court to the Kansas Supreme Court and were acted upon by the Kansas Su-

preme Court. The jurisdiction of this Court to review the decisions of the Kansas Supreme Court by appeal is conferred by Title 28 *United States Code* 1257(2), 62 Stat. 929. The judgments of the Supreme Court of Kansas were entered on November 2, 1963, and timely petitions for rehearing were denied on January 3, 1964. Notice of appeal was filed in the Kansas Supreme Court on March 14, 1964.

These appeals involve the proceedings and consequent State Corporation Commission orders which gave rise to the ratable take orders found invalid in *Northern Natural Gas Company* v. *State Corporation Commission*, 372 U.S. 84, 83 S. Ct. 646, 9 L.Ed.2d 601 (1963). Consequently such case sustains the jurisdiction of this Court to review the judgments of the Kansas Supreme Court here on appeal. On a prior occasion the Kansas Commission, with the approval of the Kansas Supreme Court, sought to obtain more money for Kansas producers and royalty owners by issuing an order fixing a minimum price for gas produced from the Kansas Hugoton Field, but such order was held invalid by this Court in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, 78 S. Ct. 381, 2 L.Ed.2d 355 (1958). The orders involved in these appeals have the same objective except that the orders of the Commission now approved by the Kansas Supreme Court arbitrarily increased the volumes of gas to be produced and purchased from the Kansas Hugoton Field rather than fixing a higher price to be paid for such gas when produced. Such orders and judgments, however, are subject to the same infirmities and, therefore, *Cities Service Gas Co.* v. *State Corporation Commission, supra; Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L.Ed. 1035 (1954), and *Natural Gas Pipe Line Co.* v. *Panoma Corporation*, 349 U.S. 44, 75 S. Ct. 576, 99 L.Ed. 866 (1955), sustain this Court's jurisdiction to review the judgments here on appeal.

Such orders of the Commission (affirmed by the Kansas Supreme Court) necessarily concern matters having a direct effect upon the ability of the Federal Power Commission, pursuant to its authority, to regulate comprehensively and effectively the transportation of natural gas in interstate commerce for resale, which, under the provisions of the *Natural Gas Act*, must be achieved with uniformity of regulation by the Federal Power Commission. Consequently, *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 62 S.Ct. 384, 86 L.Ed. 371 (1942), and *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 67 S.Ct. 1482, 91 L.Ed. 1742 (1947), also sustain this Court's jurisdiction to review the judgments herein appealed, as does *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 81 S.Ct. 435, 5 L.Ed.2d 377 (1961).

As Appellant points out more fully in the Statement, these orders invade its substantive, legally protected interests. Under its contracts to take the allowables set by the Commission, Appellant is presented with the alternatives of complying with the obligations of its contracts and increasing its takes from its produeers' wells or of risking liability for breach of contract for failure to take the allowables. Also because of the cancellation of allowables granted but which appellant is unable to take and the pattern of production for other purchasers in the field, it will lose reserves which in part have formed the basis of the granting of Certificates of Convenience and Necessity by the Federal Power Commission. It would additionally have to rearrange its purchasing patterns to accommodate the greater volumes which the Commission has prescribed. This is detrimental to Appellant's interstate market, not only because of such rearrangement itself and the effect that would have upon certificated facilities, but also be-

cause it would disrupt a neat balance in the heating value of the gas which Appellant must maintain for its market.

In this context *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas, supra*, 372 U.S. at 89; *Associated Industries of New York* v. *Ickes*, 134 F.2d 694, 702 (C.A. 2) (1943); *In re Michigan-Ohio Bldg. Corp.*, 117 F.2d 191, 192-193 (C.A. 7) (1941), sustain the jurisdiction of this court. As the Kansas Supreme Court itself said in the instant case:

> "We are concerned with the nature, character, and effect of the order and not with its name." 192 Kan. at 12, 386 P.2d 266, at 275 (1963).

QUESTIONS PRESENTED

1. Where an interstate gas pipeline company, subject to the comprehensive jurisdiction of the Federal Power Commission, secures a part of its gas supply from the Hugoton Gas Field in Kansas and the remainder of its supply from other sources and from other states, may the Kansas Corporation Commission, under the guise of proration, without invading and colliding with the exclusive federal jurisdiction under the commerce clause and under the Natural Gas Act, establish and assign allowable production to wells in that field where the total of such allowables exceeds the pipeline companies' requirements from the field, where compliance would require a readjustment of the purchasing pattern of gas supply, and where the orders fixing the allowable production for the field were entered for the avowed purpose of securing for that Kansas Field a greater share of multi-state production of gas, all based upon the Corporation Commission's assessment of what should, rather than what would, be purchased and sold by the pipe line companies in interstate commerce?

2. Where the gas produced from more than 90% of the wells in the Kansas Hugoton Field is first purchased and then transported and sold by pipe line companies operating in interstate commerce and consequently such pipe line companies are the only substantial market for gas in the Kansas Hugoton Field, and pertinent orders of the Kansas Corporation Commission required information from such pipe line purchasers as to their total requirements of gas for resale and the Kansas Corporation Commission purported to fix the allowables which such pipe line companies could take from the Kansas Hugoton Field and in some instances were required by contract to take, and the total of such allowables set for such companies was greater than the aggregate market of all such companies for gas from such source of supply, can it be concluded that such orders were not directed at the interstate pipe line purchasers in a manner forbidden under our federal system and particularly by the Natural Gas Act?

3. Is not a statute amending the Kansas Gas Conservation Act which provides the following:

> "The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand."

invalid as an invasion of the exclusive federal jurisdiction or sphere of authority under the Commerce Clause already occupied by the comprehensive regulatory scheme of the Natural Gas Act?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article 1, Section 8,

"Powers of Congress. The Congress shall have Power—
* * *

"To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;"

The *Natural Gas Act*, 15 U.S.C. 717,

§ 717. Necessity for regulation of natural gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Kansas Gas Conservation Act, G.S. Kan. 1949, 55-703.

55-703. Production regulations, rules and formulas. That whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: *Provided, however,* That the daily takes of gas from any well shall not exceed 25 percent of its open flow: *Provided, further, however,* That the provisions of this act shall not apply to any

common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand cubic feet per day. [L. 1935, ch. 213, § 3; L. 1945, ch. 233, § 3; March 24.]

Such statute was amended in 1959 [the first appeal involves the original Sec. 703, while the second appeal involves the amended Sec. 703] and, since the amendment, Sec. 703, reads as follows, with the changes from the old statute in heavy black type,

55-703. Production regulations; rules and formulas. Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of **any one common source of supply as against another and in favor of** or against any producer in any

such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: *Provided, however,* That the daily takes of gas from any well **in an unprorated gas pool** shall not exceed twenty-five percent (25%) of its open flow: *Provided further, however,* That the provisions of this act shall not apply to any common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. **The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand.** [G.S. 1949, § 55-703; L. 1959, ch. 237, § 1, June 30.]

STATEMENT

Appellant, Colorado Interstate Gas Company, is a corporation engaged in the business of purchasing natural gas for transportation and sale in interstate commerce for resale and accordingly is a "natural gas company" as defined by the *Natural Gas Act*, 15 U.S.C. 717a. It purchases gas in the Kansas Hugoton Field pursuant to gas purchase contracts filed with the Federal Power Commission but makes no purchases from either the Oklahoma or the Texas portions of the tri-state Hugoton Field. Its contracts for purchase of gas in the Kansas Hugoton Field are, for the most part, "take or pay for" contracts, based

upon allowables set by the Corporation Commission* (R. Vol. I, pp. 64-66; Vol. III, pp. 48, 73-84; Vol. IV, pp. 31-32; Vol. I², pp. 2-3, 22-25.)**

The controversy began with a Notice of Hearing sent by the Kansas State Corporation Commission to all producers and purchasers of natural gas in the Kansas Hugoton Field, notifying such persons that the Commission would hold its usual market demand hearing for the proration period extending from April 1 to September 30, 1956. A similar notice was sent for all other proration periods which occurred every six months. A copy of one such notice is attached hereto as Appendix H (R. Vol I, pp. 3-4; Vol. II, pp. 3-4; Vol. I², pp. 2, 5).

At the same time and in conjunction with the market demand hearings, the Kansas State Corporation Commission entered a show cause order on its own motion on March 16, 1956, directed solely to the gas purchasing companies in the Kansas Hugoton Field, requiring such companies to show cause why they should not be required to take ratably from the various wells in the Kansas Hugoton Field and directing such purchasing companies to provide the Commission with information as follows:

1. Copies of the data used by it in making its nominations (its estimates of its requirements for the proration

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* The obligation is "to take" the allowable set and if it is not taken, nevertheless "to pay for" such allowable.

**The record is in two parts. One relates to all the appeals before the amendment of the Kansas Gas Conservation Act and consists of nine volumes. Citations to this record will be by volume and the pertinent page in such volume, as Vol. V, p. 20.

All of the appeals after the amendment to the Kansas Gas Conservation Act are in a separate record consisting of eleven volumes. Citations to this record will be by volume to the second power, so that citations thereto will be by volume and the pertinent page in such volume, as Vol. V², p. 20

period) and the factors used in allocating its demand for gas to its various sources of supply in whatever states such sources of supply are located;

2. The amount of developed gas reserves underlying all acreage connected to its transmission system in all its sources of supply wherever located;

3. The production purchased from all fields in all states by months beginning with 1954;

4. For all such fields and states the ratio of production during 1954 and 1955 to such developed reserves;

5. Each purchasing pipe line company's customer demand for gas for the proration period.

Appellant and other pipe line purchasers at all times objected, inter alia, on Federal grounds, both to the obtaining of such information and the consideration thereof by the Kansas Commission in determining market demand from the Kansas Hugoton Field (R. Vol. I, pp. 9-12, 149; Vol. III, pp. 4-5, 8-10, 18-19, 48, 72, 137-138, 191-194, 206, 256-262, 286; Vol. IV, pp. 3, 6-7, 39, 48; Vol. I^2, pp. 1-5).

Copy of such show cause order is attached hereto as Appendix I. This show cause order was updated from time to time as proration periods went by with the demands on all purchasing companies remaining the same, except for the dates for which such information was demanded.

Pursuant to such notice directed to the purchasing companies and the show cause order directed to all the purchasing companies in the Kansas Hugoton Field, the Commission held hearings over a period of some two years during which time it entered interim orders in the form as indicated in Appendix D. At such hearings the Commission heard evidence concerning withdrawals from the

entire Hugoton Field, including Oklahoma Hugoton and Texas Hugoton, as well as Kansas Hugoton and the possibility that gas might drain from Kansas to Oklahoma and on to Texas because of the more rapid withdrawal of gas from Oklahoma and Texas portions than from the Kansas Hugoton Field (R. Vol I, pp. 15-29, 33-37, 69-72, 77-83, 92-98, 105-109, 160-182, 186-187; Vol. I², pp. 6-10).

The Commission also heard evidence purporting to show that the purchasing companies were not allocating a fair share of their consumer demand for gas to the Kansas Hugoton source of supply and recommending that the Commission should, accordingly, in determining the market demand for the Kansas Hugoton Field, fix a schedule of well allowables of sufficient magnitude to enable Kansas Hugoton to achieve its share of the national market for gas based on the ratio of reserves to such national market (R. Vol. II, pp. 42-62, 63-82; Vol. I², pp. 12-15).

The evidence concerning a fair share of the consumer market for the Kansas Hugoton source of supply and the possibility of drainage between states in the Hugoton Field was at all times objected to by Appellant and other purchasing companies on the grounds that it had nothing whatever to do with a determination of the market demand for Kansas Hugoton gas and that the consideration of such matters in determining the Kansas Hugoton market demand was beyond the jurisdiction of the Commission under the Commerce Clause of the United States Constitution and involved the jurisdiction and authority granted to the Federal Power Commission by the Natural Gas Act. It was also objected by the pipe line purchasers that orders entered giving effect to such factors would not prorate the production of gas from such field for the purpose of or in a manner which would prevent waste or protect correlative rights and, therefore, would bear no

reasonable relation to any legitimate state objective and, accordingly, were not within the ambit of state authority (R. Vol. III, pp. 6-10, 18-19, 138, 192-194, 253, 256, 261-262, 284, 286; Vol. IV, pp. 39, 43, 66-67).

Appellant presented evidence to show the Commission that it took gas ratably from the wells in Kansas Hugoton connected to its system, that many of its Kansas Hugoton Field contracts required it to take or pay for the full allowables assigned to the wells over the period of the contract year and that therefore if the Commission should establish allowables in excess of the actual market demand or the actual production (runs) from the field, appellant would be faced with a very serious problem which could result in a loss of allowables, a loss of reserves, and the distinct possibility that it would be forced to pay for gas which it did not take and perhaps could never take. It pointed out that its consumer contracts required a B.T.U. (British Thermal Unit) content of gas higher than the average B.T.U. content of its Kansas Hugoton gas, requiring it to blend its Kansas Hugoton gas with gas from other fields and other states having a higher B.T.U. content[1] (R. Vol. I, pp. 64-65; Vol. III, pp. 73-84, 169-185, 295, 299; Vol. I[2], pp. 22-25).

Other purchasers also showed the Commission that they were unable to take the volumes of gas from the Kansas Hugoton Field which the Commission sought to have taken without disrupting their purchasing patterns

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[1] Appellant's sale contracts require a minimum heating value for the gas it supplies of 963 B.T.U. Its Kansas Hugoton gas averages in heating value only 954 B.T.U. It is, therefore, perfectly obvious that Appellant must blend gas for its market, consisting of Kansas Hugoton gas and gas from other sources having higher heating value. Its purchasing pattern from its sources of supply is, in considerable part, dictated by the heating value of the gas in such sources of supply.

from their various sources of supply and without increasing their facilities both in line size and in compression and gathering facilities in the Kansas Hugoton Field. It was also shown that to change such patterns would not only increase the cost of Kansas Hugoton facilities but would decrease the usability of other facilities, thus increasing the overall average cost of gas (R. Vol. I, pp. 38-42, 48-57, 184-185, 315-316; Vol. III, pp. 48-58, 64-65, 68-70, 84-90; Vol. II², pp. 51-66, 73-83, 99-113, 121-129).

In addition it was shown to the Commission that its orders setting market demand at a figure higher than the actual production from the field without making provision for correcting such figure for overproduction and under production occurring during the market demand period and thus failing to give recognition to the actual runs or proven market from the field, caused disparity in takes by the various gas purchasing companies, whose wells are interspersed throughout the Kansas Hugoton Field, and caused drainage, cognizable and uncompensated, between developed leases in the Kansas Hugoton Field. Such drainage could, and undoubtedly would, cause loss of reserves by some of the gas purchasing companies to other gas purchasing companies—reserves dedicated to such companies' interstate markets under contracts filed with the Federal Power Commission on which certificates of public convenience and necessity were issued by the Federal Power Commission (R. Vol. I, pp. 38-44, 46-48, 49-55; Vol. III, pp. 25-30, 34-37, 44-48, 52-55, 67-69, 71-72, 80-84; Vol. I², pp. 1-5, 6, 54).

During these hearings, the Commission entered interim orders. See Appendix D. During this period due to the inability of the purchasers to take the allowables granted, underages of significant size began to accumulate in the Kansas Hugoton Field. Such underages (allowables

granted but not produced) grew until by the date of the last order in the second set of appeals—March, 1960—the accumulated underage was over 152 million MCF (152,000,000,000 Cu.Ft.). A tabulation of the nominations, the actual runs from the Kansas Hugoton Field and the underage in such field is attached hereto as Appendix J (R. Vol. I, pp. 29-33, 57-59, 72-77, 99-101, 109-121, 187-196, 199-204, 251-253, 317-335; Vol. II, pp. 100-104, 162-163, 169-171; Vol. I², pp. 31-53).

The Commission finally entered a general order indicating its views, effective February 1, 1958, which order was of general application and related to all orders from April, 1956 and to all orders entered thereafter. It recognized that it was making its determinations in joint dockets concerned with a determination of market demand and a show cause order directed to the purchasers of natural gas in the Kansas Hugoton Field. Such order recites that the Commission considered the migration of gas from the Kansas Hugoton Field to the Oklahoma and Texas portions of such Hugoton Field and steps the Commission should take to prevent any such migration of gas from Kansas, the duty of the Commission to prevent unreasonable discrimination within, and inequitable withdrawals from, the Kansas Hugoton Field. The Commission determined that it would itself set the market demand (the amount of gas it thought should be purchased from said field) and would not make provision for the correction of such determination because of production in excess of or less than the allowables during the proration period but would consider:

(a) The takes of the pipe line purchasers from other sources of supply, wherever located, to which such purchasers are connected;

(b) The total markets for gas of all purchasers from the Kansas Hugoton Field and the increase in such markets

as compared to the rate of increase in takes from the Kansas portion of the Hugoton Field;

(c) The purchasers' takes from other sources of supply in Kansas; and

(d) Any other factors, conditions and/or circumstances that would aid the Commission in establishing the market demand.

Such order of general application is attached hereto as Appendix E and contains two specially concurring opinions, one by the Chairman of the Commission, expressing doubt that the Commission has the power and authority to remedy the interstate situation confronting the Commission and further recognizing the immense underages which had arisen and which were coercive on the pipe line purchasers to change their purchasing patterns and to take more gas from the Kansas Hugoton Field (R. Vol. I, pp. 205-216, 216-220; Vol. III, pp. 238-240).

Appellant filed a timely petition for rehearing and, after its denial, a petition from judicial review. Actually there was a petition for judicial review from the general order of the Commission of February 1, 1958, and from each monthly order of the Commission beginning with November of 1957. These petitions for review are all similar. They do, like all the petitions for rehearing, raise Federal questions, as presented herein. A copy of one of such petitions for judicial review is attached hereto and made Appendix K (R. Vol. I, pp. 222-242, 250-251, 253, 319; Vol. I[2], pp. 55-71).

The petition for judicial review filed by Appellant was heard in conjunction with petitions filed by other parties in proceedings in which all interested parties intervened. After hearing, the District Court of Finney County, Kansas, found the interim orders entered by the

Commission from April of 1956 through November of 1957 were void and should be set aside and the orders entered by the Commission beginning in December of 1957 through January of 1959 were void and should be set aside on the grounds that such orders did not accord with the pertinent provisions of the Kansas Gas Conservation Act. The Commission and other interested parties appealed to the Supreme Court of Kansas (R. Vol. I, pp. 335-369; Vol. II, pp. 171-195; Vol. III, pp. 323-343; Vol. IV, pp. 72-87).

The Commission called the attention of the Legislature to its experiments in the Kansas Hugoton Field and asked for a clearer mandate from the Legislature to obtain authority to order a planned depletion of the Kansas Hugoton Field (R. Vol. IV, p. 46). Such report of the Commission to the Legislature is attached hereto and made Appendix L. Thereafter the Legislature amended the Kansas Gas Conservation Act as shown under statutes involved, herein at pages 10-11, the changes in the section being shown in heavy black type.

Thereafter the Commission entered orders each six months determining market demand in conformity with its general order of February 1, 1958, and each month entered monthly orders fixing a schedule of production allowables. After hearing evidence concerning drainage from the Kansas Hugoton Field to the Oklahoma and Texas portions of the field and after hearing evidence that it should order a planned depletion to achieve runs from the Kansas Hugoton Field in an amount commensurate with the reserves in the Kansas Hugoton Field as compared with gas reserves both within and without the state of Kansas, the Commission continued its practice of permitting allowables to remain at a figure far in excess of production of the field in an effort to obtain a greater share of the interstate market for gas from Kansas Hugoton.

This was done despite objection to such efforts as being outside the ambit of state jurisdiction and despite evidence by the pipe line purchasers demonstrating that such orders would violate the Commerce Clause and the exclusive jurisdiction of the Federal Power Commission by jeopardizing reserves upon which certificates had been issued by the F.P.C., by inducing changes in purchasing patterns, by causing increase in cost of service due to "take or pay for" contracts, by causing the pipe line purchasers to change their facilities and to get less than full use from the facilities already certificated by the F.P.C. Copy of a representative six months order is attached hereto as Appendix F and a copy of a monthly order illustrative of all such monthly orders is attached as Appendix G (R. Vol. II, pp. 82-99, 100-104, 162-163, 169-170; Vol. IV, pp. 69-71; Vol. I², pp. 26-54).

Petitions for judicial review were filed by Appellant in Finney County, Kansas, and by other parties both in the District Court of Finney County, Kansas, and in the District Court of Stevens County, Kansas. Copy of one such petition by Appellant, illustrative of all its petitions, which continued to raise the Federal questions involved herein, is attached hereto as Appendix K. Both the District Courts of Finney and Stevens Counties, Kansas, found that the orders of the Commission under the amended Kansas Gas Conservation Act were valid. After denial of motions for a new trial which, *inter alia*, were based on Federal questions, Appellant appealed to the Supreme Court of Kansas, its specifications of error raising Federal questions involved herein being attached hereto as Appendix M (R. Vol. II, pp. 105-127, 161; Vol. I², pp. 55-67, 68-71, 73-78, 78-82; Vol. II², pp. 273-275).

The record, insofar as Appellant and the Commission are concerned in such appeals from the judgment sustain-

ing the orders entered after amendment of the Kansas Gas Conservation Act, is contained in a stipulated abstract. Therein it appeared that the Commission's activities and its orders were calculated to increase the runs from the Kansas Hugoton Field. It was recognized that great underages had developed by virtue of the Commission orders and such underage caused pressure differentials between developed leases within the Kansas Hugoton Field and resulted in cognizable, uncompensated drainage between developed leases in the Kansas Hugoton Field. A comparison of the nominations, the actual production and the accumulated underages relating to the orders involved in such appeals is attached as Appendix J. A schedule was introduced as an exhibit, showing drainage between the Kansas and the Oklahoma portions of the Hugoton Field, disclosing that since the field was first developed there was a net drainage from Oklahoma to Kansas of some 39.777 MMMCF and that at the 1958 rate of migration, it would take Oklahoma 58 years to recoup the gas previously lost to Kansas (R. Vol. J², pp. 1-2, 3-4, 19-20).

The Kansas Supreme Court entered orders, one relating to all the appeals before the change in the Kansas Gas Conservation Act, and one relating to all the appeals thereafter, appointing The Honorable Harry W. Colmery as Commissioner, with full power to hear the issues and contested matters in such cases and report thereon to the Supreme Court. Such Commissioner filed two reports containing voluminous findings of fact and conclusions of law. Indeed these are the only findings made at any stage of the proceedings. His report in the first set of appeals (before the amendment of the statute) is contained in the record, Volume VII, Part 7, and in the second set of appeals (after the amendment to the Kansas Gas Conservation Act) in the record, Volume IX², Part 10.

Such Commissioner in his findings determined that almost all of the Kansas Hugoton gas is transported through large pipe line systems to markets far removed from Kansas and that such pipe line purchasers are natural gas companies under the Natural Gas Act. The producers who have long-term sale contracts with such purchasers are also natural gas companies under the Natural Gas Act and such contracts for sale are filed with the F.P.C. The gas reserves behind such contracts are dedicated to the markets of the interstate pipe line purchasers and constitute a part of the gas reserves supporting and justifying the issuance of certificates of public convenience and necessity by the F.P.C. These pipe line purchasers constitute substantially all the market for Kansas Hugoton gas. The market demand is the aggregate of the volume of gas which such pipe line purchasers will purchase within a given period from the field. Setting of market demand at a higher volume causes underages which under the field rules are subject to cancellation resulting in a loss of gas reserves from the pipe line purchaser suffering cancellation, with a corresponding gain of reserves by pipe line purchasers not suffering cancellation, thus diverting reserves from one out of state market to another. Such Commissioner determined that the Commission had no authority to act in regard to drainage from the Kansas Hugoton Field to the Oklahoma Hugoton Field nor to allocate any volume as the market demand for the field on the basis that such volume represents a fair share of the total consumptive interstate gas market for Kansas Hugoton—that such items do not relate to production and gathering within Kansas but relate solely to sales in interstate commerce for resale. The Special Commissioner so appointed concluded that all of the orders issued by the Kansas State Corporation Commission involved in both sets of appeals were void when tested under the

Kansas State Constitution and the laws of Kansas and there was no need to examine the Federal questions, which would arise only if the orders were valid when tested by the Kansas Constitution and laws (R. Vol. IX². Part 10, pp. 19-22, 24-29, 36-39, 44-46, 50-53; and Conclusions, pp. 1-10).

Thereafter the matters were heard by the Kansas Supreme Court. Its regular Commissioner, Hatcher, C., wrote two opinions for the Court, one relating to the first set of appeals before the amendment to the Kansas Gas Conservation Act, and one relating to the appeals arising after the amendment to such Act. The Supreme Court acknowledged only that substantially all Kansas Hugoton gas is transported and sold in interstate commerce but otherwise ignored the findings of its Special Commissioner and determined that all the orders were valid and did not constitute an interference with inter[illegible]e commerce nor invade the province of the Federal Power Commission under the Natural Gas Act and did not violate the Due Process Clause of the United States Constitution nor impair the obligation of contracts (R. Vol. IX, Part 1, pp. 4, 26-28). These opinions are attached hereto as Appendices A and B and are contained in the record—the opinion in the first set of appeals in Vol. IX, Part 1, at pages 1 through 29; the opinion in the second set of appeals in Vol. XI², Part 1, at pages 29-38.

THE QUESTIONS ARE SUBSTANTIAL

These appeals involve the power of a state to interfere with and to extert leverage upon the purchasers of natural gas for resale in interstate commerce. The orders entered by the Commission are not proration order and do not prevent waste and protect correlative rights, which

is the function of a proration order. Such orders, on the contrary, are an attempt at planned depletion for the field and are motivated by a desire to obtain for the Kansas Hugoton Field a greater share of the consumptive market for gas in the United States and thus to increase revenues to the producers and royalty owners in the field. The orders by their operative effect are intended to, and do, exert leverage upon and coerce pipe line purchasrs —natural gas companies who purchase gas for resale in interstate commerce—to change their purchasing patterns, to change their plans and facilities and the use of such facilities or lose reserves dedicated to their interstate markets and, in Appellant's instance, to increase the cost of service by making it probable that it may have to pay for gas which it does not currently purchase and may never be able to purchase.

These appeals present a situation which in reality is the second attempt of the Kansas State Corporation Commission to obtain more revenue for Kansas producers and royalty owners, but which, unlike the first attempt involving price, involves volumes. One aspect or off-shoot of such second attempt led to *Northern Natural Gas Co. v. State Corporation Commission of the State of Kansas, supra.* When such appeal was filed, this Court invited the comments of the Federal Power Commission which were made in a memorandum as *amicus curiae*. The situation as set forth in such memorandum and which prompted the F.P.C. to support the view that this Court should note probable jurisdiction is present in instant appeals.

The entire Hugoton Field, which constitutes a single source of supply, is located in Kansas, Oklahoma and Texas. The Kansas portion is controlled by the Kansas Corporation Commission under the Kansas Gas Conservation Act. The Oklahoma portion is controlled by the

Oklahoma Corporation Commission under the laws of Oklahoma, 52 *Okla. Statutes Annotated,* 21 through 35, 231 through 233, 236 through 247, while the Texas portion is controlled by the Railroad Commission under Texas statute, *Vernon's Annotated Texas Civil Statutes,* Article 6008, 10 through 22; Article 6008a-2; Article 6049c-7; Article 6049d-4. Each of the three state agencies operates independently of the others. There is no coordination among the three states. Each state administers the portion of the field lying within such state as a separate common source of supply. The purchasers who constitute the market for gas are different in the different states. None of the purchasers are required to take ratably from all connections which they may have in the different states but are required to take ratably only among their own connections within each state. The Kansas portion of the field is by far the largest. The connections of each of the pipe line purchasers therein are interspersed with those of other pipe line purchasers. Rates of production among the pipe line purchasers in the Kansas Hugoton Field is unequal, resulting in drainage between developed leases within said field which is cognizable and uncompensated.

The effect of the Commission's orders is one of coercion. These orders compel a pipe line purchaser to purchase gas equal to that purchased by each of his neighboring purchasers despite the fact that the allowables assigned to the field are far in excess of the actual demand for gas from the field. Failing so to do, the neighbor will drain its gas causing loss of reserves and a shift of reserves from one purchaser's interstate market to the other's interstate market.

The Commission, in an effort to obtain for the Kansas Hugoton Field a greater share of the interstate consump-

tive market for gas, has in such orders determined a spurious market demand—some figure in excess of nominations (the combined estimates of all purchasers of gas from the field) and has ceased correcting such determination by the actual runs, i.e., the actual amount of gas produced and marketed from the Kansas Hugoton Field. It has determined this fictitious market demand after considering the volumes purchased and produced from other sources of supply by the pipe line purchasers, the total resale markets of the pipe line purchasers and the increase in such resale markets as compared with the increase of the volumes taken from the Kansas Hugoton Field. This the Commission has done despite the correct observation of its then Chairman, Mr. Beatty, that such orders are not proration, that they have caused great underages to develop, and that they are coercive upon the pipe line purchasers due to the necessity of each such purchaser to protect its dedicated reserves against loss of such reserves. What has occurred is that a pipe line purchaser with the greatest market which can be supplied from the Kansas Hugoton Field is taking more than its *pro rata* share from such field causing drainage to its leases from neighboring leases and unless the other pipe line purchasers change their purchasing patterns and increase their Kansas Hugoton purchases to meet such competition, it will acquire a part of the reserves of such other purchasers who have a lesser demand for Kansas Hugoton gas. It is, therefore, obvious that under orders so conceived, some pipe line purchasers are given the option of either (1) losing their reserves dedicated to their interstate markets; or (2) changing their purchasing patterns to permit them to purchase more gas from the Kansas Hugoton Field and consequently less gas from other sources of supply, no matter what operating problems may be caused thereby and regardless of the effect such action may have on the overall

cost of gas to such companies. These are the alternatives faced by this appellant.

Of course if Kansas can enter orders designed to force pipe line purchasers to purchase more gas in Kansas, so can the authorities of other states. The aggregate of the coercive allowables granted by the several states could well be, and undoubtedly would be, greater than the total interstate market for gas. Quite obviously such action in either alternative has direct impact upon the cost of gas to the pipe line purchasers and therefore to the ultimate consumers. The orders must therefore fall, under this Court's opinions in *Phillips Petroleum Co.* v. *Wisconsin*, *supra*; *Natural Gas Pipe Line Co.* v. *Panoma Corp.*, *supra*, and *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, *supra*.

The orders herein involved, while ostensibly issued as conservation orders, go far beyond the boundaries of the area of conservation and proration which have been recognized as legitimate state interests for many years. It is stipulated in the record that there is drainage and cognizable drainage between developed leases in the Kansas Hugoton Field. This drainage is toward the pipe line purchaser who has the greatest demand for Kansas Hugoton gas and who, by reason of allowable production in excess of the total demand from the field, is obtaining more than its share of the gas actually produced from the field. Obviously this is not proration as recognized by this Court many years ago in *Thompson* v. *Consolidated Gas Utilities Corporation*, 300 U.S. 55, 57 S.Ct 364, 81 L.Ed. 510 (1937).

Nor are the orders involved insulated as coming within the definition of production and gathering. This exemption from the Natural Gas Act is to be narrowly construed, as this Court held in *Northern Natural Gas Com-*

pany v. *State Corporation Commission of the State of Kansas, supra.** The orders here were entered under notice directed to the pipe line purchasers and pursuant to a show cause order directed to the pipe line purchasers. The motive behind the orders was not to limit production but to increase the purchases of gas from the Kansas Hugoton Field by removing all practical limitations on production. The problem that arises, therefore, is concerned with market demand which involves purchases of gas and not production or gathering. Indeed the Kansas Supreme Court itself recognized in the *Northern* case, 188 Kan. 355, at 360,

> "* * * that natural gas can not be produced unless someone is ready to buy it, it can not be stored in a tank on the lease."

The whole impact of the order is on purchases of gas and such purchases are made by interstate pipe line companies for transportation in interstate commerce for resale. Obviously an allocation of sources of supply within a state by a state agency to the interstate consumptive market served by sources of supply in several states is a matter which one state can not effectively regulate and therefore, regulation of this nature can be achieved only by the Federal government. *Federal Power Commission* v. *Transcontinental Gas Corp., supra.*

There is no legitimate basis for the orders upheld by the Kansas Supreme Court. The only findings, made by the Special Commissioner, Mr. Colmery, point directly toward the invalidity of such orders. The Kansas Supreme Court would disregard without attempting to discredit such findings and attempt to hide behind the "expertise"

*Compare with this Court's earlier treatment of the same exemption in *Interstate Natural Gas Co.* v. *Federal Power Commission, supra.*

of the Commission. This is not permissible, as pointed out by this Court in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, at 167, 83 S.Ct. 239, 9 L.Ed.2d 207, at 215 (1962).

> "* * * Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'"

Orders, such as those herein involved, affecting prices or volumes of purchases of gas are beyond the constitutional power of the state. See *Northern Natural Gas Company* v. *State Corporation Commission of the State of Kansas, supra.**

Congress, by the passage of the Natural Gas Act, occupied the area where the states could not constitutionally act. This Court recognized the situation, as compare *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra*, with *Interstate Natural Gas Co.* v. *Federal Power Commission, supra*. Thereunder the states have no authority in this area where the exclusive jurisdiction is in the

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*See comment *Federal Preemption and State Conservation in Northern Natural Gas*, 77 Harvard Law Review 689, particularly at 699; and see the dissent on the merits by Chief Judge Murrah of the 10th Circuit (the majority of the Court invoking the doctrine of abstention) in *Gulf Oil Corp.* v. *Corporation Commission of Oklahoma*, 147 F. Supp. 640, particularly at 649-650 (W.D. Okla.) (1956). It has long been decided that states can not either by action or inaction regulate the transportation of natural gas out of a state since such action would obviously unreasonably burden interstate commerce, as note *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716 (1911); *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923); and *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434 (1920).

Federal Power Commission. *Phillips Petroleum Company v. Wisconsin, supra*, and see *Natural Gas Pipe Line Company v. Panoma Corporation, supra*; as well as *Cities Service Gas Co. v. State Corporation Commission of Kansas, supra*, and *Phillips Petroleum Company v. Corporation Commission of the State of Oklahoma*, 355 U.S. 425, 78 S.Ct. 409, 2 L.Ed.2d 412 (1958).

This exclusive jurisdiction of the Federal Power Commission is not merely related to price or to sales of gas but also extends to certificates, to volumes, facilities, and the abandonment of facilities. *Sun-Ray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 80 S.Ct. 1382, 4 L.Ed.2d 1623 (1960) and *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959).*

Here Kansas sought to regulate in an interstate gas field, after consideration of drainage from the Kansas Hugoton Field to the Oklahoma Hugoton Field, and after consideration of the interstate markets of the pipe line purchasers, even though, of course, state power stops at the state line, as see *Gomillion v. Lightfoot*, 364 U.S. 339, 347, 81 S.Ct. 125, 5 L.Ed.2d 110, 117 (1960).

The State of Kansas has made other attempts to invoke its views on the United States and on natural gas companies as defined by the Natural Gas Act. It sought first to set minimum prices under the mantle of the pro-

*There are, of course, many cases from lower courts, all consistently holding that where sales of gas are involved, the states may not act under the production or gathering exemption of the *Natural Gas Act*, 15 U.S.C. 717(b), as see *Federal Power Commission v. J. M. Huber Corp.*, 133 F. Supp. 479 (D.N.J.) (1955); *J. M. Huber Corp. v. F.P.C.*, (C.A. 3) 236 F.2d 550 (1956); *Deep South Oil Co. of Texas v. F.P.C.*, (C.A. 5) 247 F.2d 882 (1957); *Saturn Oil & Gas Co. v. F.P.C.*, (C.A. 10) 250 F.2d 61 (1957); and *Continental Oil Co. v. F.P.C.*, (C.A. 5) 266 F.2d 208 (1959).

duction and gathering exemption of the Natural Gas Act. It was rebuffed by this Court in *Cities Service Gas Company* v. *State Corporation Commission of Kansas*, *supra*. It then embarked on the orders presently here on appeal, attempting to achieve more revenue for Kansas producers and royalty owners through volume if it could not through price. On the way it sought to impose ratable take orders on purchasers and was again rebuffed by this Court in *Northern Natural Gas Company* v. *State Corporation Commission of the State of Kansas*, *supra*.

The Kansas Supreme Court has failed to comprehend the import of these decisions. It still persists in its view that the State of Kansas is in some manner exempt from the limitations placed on the states by the Constitution and laws of the United States of America and holds blindly that the present orders have no bearing on interstate commerce and no effect on the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act. It so holds despite the fact that the Commission orders obviously and by their necessary effect seek to regulate purchases of gas and to allocate to the Kansas Hugoton Field a portion of the interstate consumptive market for gas in these United States. Such orders do exert leverage and are coercive on the pipe line purchasers who provide the market for Kansas Hugoton gas. These orders, while denominated production orders, are concerned with the market demand for gas, the actual purchases of gas for transportation in interstate commerce. The orders affect reserves dedicated to interstate markets under certificates issued by the Federal Power Commission. The orders directly affect the purchasing patterns of the pipe line purchasers and their sources of supply in many states. The orders obviously affect the facilities certificated to the pipe line purchasers by the Federal Power Commission. Any and all of such matters obviously affect interstate com-

merce and, even more patently, encroach upon the exclusive jurisdiction of the Federal Power Commission. Such orders upheld by the Kansas Supreme Court's judgments here on appeal are no more than the third prong of a trident attack upon the Supremacy Clause. We submit that this Court must again speak and speak plainly to the Kansas Supreme Court and strike down the orders herein appealed as another attempt by the State of Kansas to regulate sales of natural gas in interstate commerce.

Respectfully submitted,

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APPENDIX A

Opinion and Judgment of the Kansas Supreme Court in the First Set of Appeals

No. 41,515

COLORADO INTERSTATE GAS COMPANY, *Appellee*, v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, *Appellants, Cross-Appellants*, and *Cross-Appellees*.

No. 41,516

NORTHERN NATURAL GAS COMPANY, a corporation, *Appellee*, v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, *Appellants, Cross-Appellants*, and *Cross-Appellees*.

No. 41,555

COLORADO INTERSTATE GAS COMPANY, *Appellee*, v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, *Appellants, Cross-Appellants*, and *Cross-Appellees*.

No. 41,556

NORTHERN NATURAL GAS COMPANY, a corporation, *Appellee*, v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, *Appellants, Cross-Appellants*, and *Cross-Appellees*.

SYLLABUS BY THE COURT

1. GAS—*Review of Commission's Order—Petition for Rehearing.* A district court has no jurisdiction to review an order of the State Corporation Commission issued under the provisions of the Gas Conservation Statute, G. S. 1949, 55-701 *et seq.*, in the absence of a timely petition for rehearing as required by G. S. 1949, 55-606.

2. SAME—*Extent of Court's Authority to Set Aside Commission's Order.* A district court is given authority to set aside an unlawful order of the Commission issued under the Gas Conservation Statute, but it cannot direct the Commission to follow any particular formula in correcting its order.

3. SAME—*Commission's Order Stating Formulae Factors —When Not Reviewable.* Where an order of the Commission states only formulae, factors, and policy to be followed in the future and further action is necessary before it can have any effect, it is not subject to judicial review.

4. SAME—*Setting Aside Commission's Order—Court Required to Make Findings and Conclusions.* Where a district court sets aside an order of the Commission, it is required to make findings of fact and conclusions of law which disclose the reason for its judgment.

5. SAME—*Determining Validity of Commission's Orders —What Court May Consider.* In determining the validity of the Commission's orders regulating the production of natural gas, the courts can consider only the statutes granting the Commission's authority and the Commission's basic orders with such amendments as are properly made thereto.

6. GAS—*Facts Matter of Commission's Discretion—Courts Cannot Substitute Their Judgment.* The facts that are to be considered and the relative weight to be given them in making a determination are matters

left to the Commission's discretion. The courts cannot substitute their judgment for that of the Commission.

7. SAME—*Orders of Commission Fixing Production Allowables—Validity.* The record, covering numerous appeals from judgments of the district court setting aside orders of the Commission fixing production allowables for the Kansas-Hugoton Gas Field, is examined and it is held: (1) the orders were supported by substantial competent evidence; (2) the orders did not violate the provision of G. S. 1949, 55-703, or the Commission's basic order; (3) the orders did not constitute an interference with interstate commerce or invade the province of the Federal Power Commission under the Natural Gas Act; (4) the orders did not violate the due process clause of the Constitution of the United States or impair the obligation of contracts.

Appeals from Finney district court, ROLAND H. TATE, judge. Opinion filed November 2, 1963. Reversed with directions.

Robert C. Londerholm, of Topeka, argued the cause, and *J. Robert Wilson, John D. Townsend, Charles C. McCarter, J. B. Grant*, and *Charles R. Escola*, all of Topeka, and *Richard C. Byrd*, of Ottawa, were with him on the briefs for the appellant, The State Corporation Commission of the State of Kansas.

Dale M. Stucky, of Wichita, argued the cause, and *A. E. Kramer* and *Bernard Nordling*, both of Hugoton, *Wayne E. Coulson, Paul R. Kitch, Donald R. Newkirk, Robert J. Hill, Gerrit H. Wormhoudt, Philip Kassebaum, John E. Rees, Robert T. Cornwell, Willard B. Thompson, David W. Buxton, Homer V. Gooing*, and *Hugo T. Wedell*, all of Wichita, were with him on the briefs for the appellant, Southwest Kansas Royalty Owners Association.

Jeff A. Robertson, of Topeka, argued the cause, and *Wendell J. Doggett* and *C. A. Conoley*, both of Kansas City, Missouri, and *Chas. Vance* and *C. C. Linley*, both of Liberal, were with him on the briefs for the appellant, Panhandle Eastern Pipe Line Company.

Malcolm Miller, of Wichita, argued the cause, and *L. M. Poe*, Colorado Springs, Colorado, *Ray H. Calihan* and *Daniel R. Hopkins*, both of Garden City, and *Carl T. Smith*, *Stuart R. Carter*, and *Gerald Sawatzky*, all of Wichita, were with him on the briefs for the appellee, Colorado Interstate Gas Company.

Mark H. Adams, II, of Wichita, argued the cause and *Lawrence I. Shaw*, *F. Vinson Roach*, and *Patrick J. McCarthy*, all of Omaha, Nebraska, *Ray H. Calihan*, *Logan N. Green*, *Daniel R. Hopkins*, and *Ray H. Calihan, Jr.*, all of Garden City, *Mark H. Adams*, *Charles E. Jones*, *William I. Robinson*, *J. Ashford Manka*, *Clifford L. Malone*, *John S. Seeber*, *Floyd E. Jensen*, and *Joe Rolston*, all of Wichita, were with him on the briefs for the appellee, Northern Natural Gas Company, a corporation.

The opinion of the court was delivered by

HATCHER, C.: These appeals are from judgments of the district court on the review of numerous orders of the State Corporation Commission establishing allowables for the Kansas-Hugoton Natural Gas Field. The review proceedings challenged the validity of monthly allowable orders and related orders pertaining to the gas field. The many appeals filed (thirty-nine) as Cases 41,515 and 41,516 are from identical judgments rendered in separate actions which were tried together on a single record and involve the orders from May, 1956, through September, 1958. Cases 41,555 and 41,556 are appeals (thirty) from similar judgments involving the Commission's six-months allowable or-

der for the period from October, 1958, through March, 1959, and the monthly allowable order for October, 1958, through January, 1959.

The lower court "reversed and set aside" all of the orders in part. Appeals were then taken to this court.

Before the above mentioned cases reached this court for determination, additional appeals had been filed challenging judgments of district courts in two separate forums which had reviewed the same orders of the Commission fixing the six-months allowables for the period covering October 1, 1959, through March 31, 1960, and also the monthly allowable orders covering each month for the same period. Although these appeals will be disposed of in a separate opinion, they are mentioned here because the general facts are applicable to all.

It will be noted that the various parties filed separate appeals, separate abstracts, and separate briefs. Fifty-two separate printed documents consisting of abstracts and briefs have been presented to this court, all covering substantially the same facts and questions of law.

The district court, which disapproved the orders of the Commission, refused to make findings of fact and conclusions of law. In an attempt to have the issues pinpointed, and to develop some semblance of order from the voluminous and chaotic record, this court appointed Mr. Harry Colmery, a member of the Bar of this state, to make findings of fact and conclusions of law on what he thought to be the issues involved in the numerous appeals and report thereon. The Commissioner has done so in a most efficient and commendable manner. Although the Commissioner's findings and conclusions can be advisory only, they have served the very usefule purpose of forcing the parties to limit their controversy to clear-cut issues. The findings and conclu-

sions of the Commissioner are challenged in some respects. Some errors occurred because of ambiguities and confusion in the record. The report of the Commissioner has resulted in clarification of such matters through supplemental briefs.

The Hugoton Gas Field was discovered near Hugoton, Kansas, in 1922, but it was not until about 1929 that its possibilities for domestic and industrial purposes had been fully realized. It is said to be the largest known reservoir of natural gas in the world, the gas being found at a depth of about 2,600 to 2,900 feet in porous limestone and dolomite formations about 50 feet thick. The thickness of the gas producing horizons varies considerably. Such horizons are not uniform as to their porosity or permeability. The field, as presently developed, is approximately 160 miles long and varies from 40 to 72 miles in width. It covers portions of the nine counties in the southwest corner of Kansas, extends across the entire width of the Oklahoma Panhandle, and into portions of several counties of northern Texas. The largest portion, about two-thirds, of the field is located in Kansas. This portion is commonly known as "Kansas-Hugoton." The portion in Oklahoma is called "Guymon-Hugoton" and that part in Texas "Texas-Hugoton."

The sole purchasers of gas produced in the Kansas Hugoton Field, as stated by the Commission, are Cities Service Gas Company, Colorado Interstate Gas Company, Hugoton Production Company, Kansas-Colorado Utilities, Inc., Kansas-Nebraska Natural Gas Company, Inc., Northern Natural Gas Company, Panhandle Eastern Pipeline Company, Quinque Oil and Gas Producing Company, United Carbon Company, and Shallow Water Refining Company

When the basic order for the field was promulgated in April, 1944, there were only 331 Kansas wells. When these

proceedings were initiated in 1956 there were 3,555 Kansas wells producing from 2,262,748 acres. There are relatively few remaining undrilled locations.

Most of the gas from the Kansas-Hugoton Field is transported through large pipelines to points far removed from Kansas. A small portion is consumed in the Wichita, Topeka, and Kansas City areas. The rest is transported and consumed in Michigan, Minnesota, Ohio, Illinois, Indiana, Missouri, Colorado, and Nebraska. With one or two exceptions the gas produced from the Oklahoma and Texas portions of the field is similarly transported through the same large pipeline systems for the same or similar uses.

The integrated pipeline systems which transport gas from the Kansas-Hugoton Field are also connected with other gas fields. Kansas gas is therein commingled with gas from various other fields, including the Guymon-Hugoton.

In 1956, five major pipelines, Cities Service Gas Company (Cities Service), Northern Natural Gas Company (Northern Natural), Panhandle Eastern Pipe Line Company (Panhandle), Kansas-Nebraska Natural Gas Company (Kansas-Nebraska), and Colorado Interstate Gas Company (Colorado Interstate), had acquired the exclusive right to purchase the gas produced from 90% of the Kansas-Hugoton wells. (These five pipeline companies, which are involved in this controversy, will hereinafter be identified as indicated in the parentheses.) Two companies, Cities Servce and Northern Natural, controlled through purchase contracts approximately 56% of the field's deliverability.

Except for a very limited phase of Panhandle and Kansas-Nebraska's operations, these pipelines are not producers. They do not own the land, leases, or wells from which the gas is produced.

In 1935, the Kansas Legislature enacted a statute entitled "Production and Conservation of Natural Gas" (Laws of 1935, Ch. 213), which now appears, with some amendments, as G.S. 1949, 55-701, *et seq.*

G.S. 1949, 55-701, provides:

> "That the production of natural gas in the state of Kansas in such manner and under such conditions and for such purposes as to constitute waste, is hereby prohibited."

It will be noted that the first and main emphasis is placed on the prohibition against waste. The term waste is defined by G.S. 1949, 55-702.

G.S. 1949, 55-703, provides the conditions under which the Commission shall take jurisdiction over production in a gas field by the following language:

> "That whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction. . . ."

The section further provides for ratable taking:

> ". . . The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. . . ."

On the 21st day of March, 1944, the Commission promulgated what it designated "Basic Proration Order for the Hugoton Gas Field." In this order the Commission first reviewed the history, development, and production in the field. It then stated that it was necessary for the Commission to take jurisdiction and to prescribe rules for the production of gas from the wells in the field and such other wells as may be later completed. The acreage for well spacing was fixed at 640. Pressure, open-flow, porosity, and thickness of pay, which determined deliverability against the pipeline pressure, was also to be taken into consideration in determining the wells' allowable. The order further provided:

> "At such time and place as the Commission shall fix, the Commission will, after notice, conduct a hearing to determine the market demand for natural gas from said field for the next six succeeding proration periods, or for such other period of time as the Commission shall prescribe, and at said hearing may determine any other questions which may properly and legally come before the Commission for consideration thereat, and a new schedule of production allowable for the wells in said field, based upon the determination made as a result of such hearing, shall be prepared and promulgated for the ensuing proration periods."

Paragraph p of the order provided in part:

> ". . . If, at the end of any proration period, there is an overage or underage in production for any well during such period, same shall be carried forward as a charge against or credit in favor of such well and subtracted from or added to, as the case may be, the allowable for such well for the next proration period. Any overage in production from any well during any proration period which is not equalized by ratable overages from all other wells in the field or which is not compensated for in the allowables fixed for other

wells in the field for the next succeeding proration period or not otherwise made up within one year after the proration period in which it occurred, shall constitute illegal overproduction from such well and such well shall be shut in until such overage is thereby fully made up. All wells with an overproduction of three times the amount of their current month's allowable shall be shut in by the operator or producer and not permitted to produce any gas until such overproduction has been fully absorbed by deductions from such overproduction made by current allowables. When any connected well has accumulated an underage in excess of three times its allowable for the current month, such excess shall thereupon be canceled and the amount so canceled shall be spread among all the wells of the field. Any underage so canceled shall not be considered in the determining of the future production of any such well, unless, upon notice and hearing, the Commission shall otherwise determine: *Provided, however*, That in no event shall any underproduction of an unconnected well be canceled."

The order further provided:

"That this order should constitute the Basic Order for the proration of production in said field on or after March 31, 1944, and until amended, changed, or modified by further order of the Commission.

. . . . . .

"It Is Further Ordered: That the Commission hereby retains continuing jurisdiction of the subject matter hereof and of the parties hereto for the purpose of issuing from time to time such further order, amendments, additional orders, rules and regulations as may be necessary and proper in the premises."

Under the basic order each well was allowed to produce a certain quantity of natural gas per month. This was called the well's "allowable." From the beginning of proration in the Kansas-Hugoton Field until May, 1956, the

allowables were set twice a year (March and September). The Commission held market demand hearings where the pipelines presented their estimated takes (nominations) for the following six-month period. Each month the total nominations were taken to be the market demand for the field for that month. The market demand figure was adjusted by subtracting the field underage (allowables in excess of runs) for the prior month or by adding the field overage (runs in excess of allowables) for the prior month, whichever had happened. This adjusted figure (called current allowable) was spread ratably to the wells in the field.

The "net allowable" is not the figure that is spread to the wells. Only the current allowable is spread ratably among the wells in the field. Net allowable reflects the cumulative status of a well or wells. Some wells would be in an overproduced status and some would be in an underproduced status at the end of the prior month's runs. If a well were 500 MCF underproduced and its share of the field current allowable was 500 MCF, then its "net allowable" at the beginning of the month would be 1,000 MCF. The field net allowable reflected the cumulative status of the field at the beginning of the period for which the allowables were determined.

This method of calculating the allowables not only tended to hold the allowables to the requirements of the pipeline companies taking the least amount of gas from the field in proportion to which its connected reserves bore to the field as a whole, but prevented increased takes of gas by one company when it acquired new consumer markets unless the other pipelines also wanted to take more gas. If one pipeline company nominated to receive more gas, the extra allowable would be spread among all the wells in the field. If the other pipeline companies continued taking at the old rate, an underage would be created. The follow-

ing month this underage would be deducted from the market demand to find the current allowable so they would be back where they started. Obviously one pipeline company could not effect any material change in the allowables unless the other pipeline companies went along with it. The pipeline companies did not expand at the same time, when one wanted more gas, the rest could exercise veto power.

It finally became apparent to the Commission that its method of fixing allowables was preventing the individual pipeline companies from obtaining their market demands, that the allowables which it was fixing had no relation to the actual market demand in the field, and that the field was being detrimentally affected by the allowables.

When the Commission issued its order for the regular market demand hearing on March 30, 1956, to determine the allowables for the period April 1, 1956, through September 30, 1956, it also issued an order to show cause, directed to the pipeline companies, for the purpose of obtaining information with which to solve the problem which its method of fixing allowables had created.

Under such order the various purchasers to whom it was directed were required to produce certain information set forth therein not less than five days prior to March 30, 1956. On March 30, 1956, the show cause docket was consolidated with the market demand hearing for the six months' period from April 1, 1956, to September 30, 1956. Thereafter such matters were heard on a common record, although various docket numbers were assigned to such hearings for the separate six months' market demand hearings.

The April, 1956, monthly allowable order used the "old method" but was entitled "Interim Order" as were the

monthly orders to and including November, 1957. After April, 1956, the Commission started experimenting with its method of determining allowables. It merely increased the market demand figure for three months (May, June, and July, 1956). A questionable procedure as it was without factual support. Next the Commission returned to the "old method" of letting nominations control the market demand figure, but stopped adjusting the market demand figure, in arriving at the allowable, by deducting underages or adding overages for the prior month. The current allowable was the nomination plus any canceled underage, for the preceding month, to be respread to the field pursuant to the basic order. This current allowable was spread to all wells in the field. This procedure was followed from August, 195 , through February, 1958, with the exception that in February and March, 1957, the Commission disregarded a zero nomination filed by Colorado Interstate and used instead its runs for a prior comparable period.

After its Report and Order, effective February 1, 1958, closing the show-cause docket, the Commission started determining the market demand by considering nominations, the rate of increase in total consumer markets of the pipeline companies compared to the rate of increase in their takes from the Kansas-Hugoton, the takes from other sources of supply, and other factors. The Commission continued the practice of not adjusting the market demand figure in arriving at the allowable by deducting the underages or adding the overages for the prior month. This procedure was followed from March, 1958, through January, 1959, and has continued.

Colorado Interstate and Northern Natural filed separate petitions for review of the orders under consideration in the district court of Finney County. Panhandle and the Southwestern Kansas Royalty Owners Association (hereinafter referred to as Royalty Owners) intervened.

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The cases were not consolidated but were tried on a common record. The lower court "reversed and set aside" all of the orders and further directed, as to the monthly allowable orders, that:

> ". . . the allowables set forth therein are void insofar as they are in excess of the allowables which would have been established under the method of calculating allowables used by the State Corporation Commission prior to May of 1956."

Following the overruling of motions for new trials, the Commission, Panhandle, and the Royalty Owners, appellants, filed separate appeals, abstracts, and briefs. Northern Natural and Colorado Interstate, appellees, filed separate counter-abstracts and briefs. The contentions of each of the three appellants are similar in nature and will not be separately considered. The same is true of the contention of the appellees.

Certain procedural questions have been raised which will first be given attention. Although the decision on the merits may render their determinations unnecessary, it is advisable that the proper procedure be outlined in order that the courts shall not again be faced with the chaotic situation that exists here.

The appellants contend that the allowable orders issued prior to November, 1957, are not subject to judicial review because no timely application for rehearing was filed with the Commission. We agree with appellants' contention.

Proceedings for judicial review of orders of the Commission are authorized by G. S. 1949, 55-707. It provides that such actions ". . . may be brought and proceedings respecting same shall be governed by and appeals may be taken as provided in section 55-606 of the General Statutes

of Kansas of 1935 as amended [now G. S. 1949, 55-606], and that each and all of the provisions of said section, as so amended, shall apply to and govern such actions arising under this act."

With respect to actions for judicial review of the orders of the Commission, G. S. 1949, 55-606, provides:

> ". . . Before any such action may be brought by a person who was a party to the proceeding resulting in the making of a . . . order . . . of the commission, *a petition for rehearing shall first be filed with the commission within ten days from the date of the making of the . . . order . . . in question.* A rehearing shall be granted or denied by the commission within ten days from the date said petition is filed and if rehearing be not granted within ten days it shall be taken as denied. If rehearing be granted the matter shall be set for hearing as promptly as shall be convenient, and shall be determined by the commission within thirty days after the same shall be submitted. Such action may be brought by any person aggrieved, whether or not such person was the applicant for rehearing, within thirty days after the denial of the petition for rehearing, or, if rehearing is granted, then within thirty days after the final decision by the commission. . . ." (Emphasis ours.)

No petition for rehearing of any of the orders entered prior to November, 1957, were filed within the time prescribed by G. S. 1949, 55-606. The statute makes the filing of a timely petition for rehearing a prerequisite to the filing of a petition for judicial review.

The court had no authority to review the orders of the Commission except in the manner and to the extent the statute gave it such authority. (*City of McPherson* v. *State Corporation Commission*, 174 Kan. 407, 414, 257 P.2d 123.)

In *Continental Investment Corp* v. *State Corporation Comm.*, 156 Kan. 858, 137 P.2d 166, it is stated:

". . . When a person has a grievance against an order or ruling of an official board, he must seek redress in conformity with the procedure prescribed by the pertinent statute. In this case, that procedure is laid down in G. S. 1941, Supp., 55-605, 55-606 . . ." (p. 868.)

In *United States* v. *Tucker Truck Lines*, 344 U S. 33, 36, 37, 97 L. Ed. 54, 73 S. Ct. 67, the court stated the rule as follows:

"We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . ." (See also *F. P. C.* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 99 L. Ed. 583, 75 S. Ct. 467.)

The appellees do not contend that they filed timely petitions for rehearing at the time the monthly allowable orders were issued. They contend that these orders were interim, and not appealable until finalized by the Commission's general order, effective February 1, 1958.

The orders were designated "Interim Orders." The district court ruled that this designation indicated that the orders were not final.

We are concerned with the nature, character, and effect of the order and not with its name. (*Hayward* v. *State Corporation Comm.*, 151 Kan. 1008, 1013, 101 P.2d 1041.) G. S. 1949, 55-606, does not require that an order must be a "final" in order to be subject to review. It authorizes the review of "any" order by any person aggrieved by such order. It is not concerned with appeals, or appealable orders, nor with the definition of a final order

in appellate procedure, or the jurisdiction of the courts with respect to such under the Code of Civil Procedure.

Whether or not a particular determination made by an administrative body is an "order" subject to review is determined by the substance of what that agency purports to do, or has done by the order, and not by the label placed upon it. Under the review procedure, an order is reviewable which determines rights or obligations or fixes some legal relationship as a consummation of the administrative process. (*C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 92 L. Ed. 568, 377, 68 S. Ct. 431.)

The Supreme Court of the United States, in *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, 4 L. Ed. 1165, 80 S. Ct. 1131, stated the applicable principle as follows:

> ". . . We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. . . ." (p. 205.)

Each of the monthly allowable orders contained the following statement:

> "That an interim order should be entered herein determining a schedule of production allowable to wells in the Hugoton Gas Field for the month of [particular month specified] 1957, but determinative of no other issue in Docket 51,488-C (c-4916) now pending before the Commission."

It is quite definite that the Commission intended the monthly allowable order to be final but not to determine or close the investigation under the show-cause docket. As timely petitions for rehearing were not filed covering the monthly allowable orders for May, 1956, through October, 1957, the orders were not subject to judicial review.

The district court reviewed the report and order of the Commission effective February 1, 1958, in which the Commission closed the show-cause docket, found the order void, and adjudged that it be set aside. The appellants contend that the order was not a proper subject for judicial review because it did not affect the rights of the parties but merely outlined the prospective action of the Commission. Appellants' contention is correct. The report and order does not of itself adversely affect anyone. An adverse effect will follow only if some future action is taken by the Commission.

The report and order reviewed the proceedings which took place under the show-cause order issued March 16, 1956; stated the questions presented for determination; set out findings of fact and the evidence to support them; stated the market demand factors to be considered in the future; presented the method for calculation of allowables, and considered the balancing period for over and under production of wells.

Some additional action in the way of fixing definite allowables had to be taken before the order could have any actual effect. If the adverse effect will follow only if some future action is taken by the Commission, the order is not subject to judicial review. This issue was determined in *Hayward v. State Corporation Comm.*, 151 Kan. 1008, 101 P. 2d 1041, where this court had under consideration the first basic order issued by the Commission in connection with the Kansas-Hugoton Gas Field. The court stated the Commission's contention as follows:

> "Appellant [Commission] contends the basis order was not self-executing, but was merely a standard, formula or guide pursuant to which the schedule of well allowables was to be determined and thereafter promulgated; that the commission had not completed its

work, in that it had not yet determined and hence had not issued its schedule of well allowables. . . ." (p. 1014.)

The court held that the duties of the Commission were prematurely and improvidently stayed, stating:

". . . The fundamental principle that courts have no right to interfere by injunction with administrative and legislative functions yet to be performed by the corporation commission, is well established. (*State, ex rel.*, v. *Flannelly*, 96 Kan. 372, 386-387, 152 Pac. 22; *Kansas City* v. *Utilities Commission*, supra; *State, ex rel.*, v. *Capital Gas & Elec. Co.*, 139 Kan. 870, 888, 33 P. 2d 731; *State Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 78 L. Ed. 500, 504-505.) Cases involving completed administrative and legislative functions are not in point. . . ." (l.c. 1015.)

The decision appears to be in harmony with the decisions of the Supreme Court of the United States.

In *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754, the court said:

". . . the order sought to be reviewed does not of itself adversely affect complainant, but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts on these situations is either premature or wholly beyond their province." (p. 130.) (See also, *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 92 L. Ed. 568, 68 S. Ct. 431 and *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.)

In the appeals Nos. 41,515 and 41,516, the monthly allowable orders for the months beginning May, 1956, and extending through November, 1957, and in appeals Nos. 41,555 and 41,556, the monthly allowable orders for the months October, November, and December, 1958, and Jan-

uary, 1959, were found by the district court to be void, and reversed and set them aside, stating:

> ". . . that the allowables set forth therein are void insofar as they are in excess of the allowables which would have been established under the method of calculating allowables used by the Commission prior to May of 1956." (Although the wording is not exactly the same in all the judgments, the result is the same in each.)

The administration of the law with respect to the production and conservation of natural gas is classified in that recognized area of regulation which necessitates the authority to exercise a considerable degree of discretion. The legislature delegated that authority to the Commission and with great latitude for the exercise of discretion through the promulgation of rules, regulations, orders, and decisions. In recognition of that authority, in providing for judicial review of the Commission's actions, it specifically limited the authority of the reviewing court by providing that:

> ". . . The authority of the court shall be limited to a judgment either affirming or setting aside in whole or in part the rule, regulation, order or decision of the commission. . . ." (G. S. 1949, 55-606.)

The record before us shows that prior to May, 1956, the Commission followed a pattern or formula in the setting of allowables and that after May, 1956, it adopted a different formula. The nature of the difference is not material at this point. It is sufficient to state, and it is agreed, that a change was made and that it produced different results.

The appellants contend that the district court, by its order, reduced the allowables to a determinable figure, made its own determination of what the allowables should

be, and determined what formula should be used. We are forced to agree.

G. S. 1949, 55-606 gives the reviewing court authority to set aside any unlawful or arbitary or unreasonable order, in whole or in part. But it does not give the court authority to substitute its judgment for that of the Commission by directing the Commission to enter a certain type of an allowable order or by prescribing the formula which it must follow. The court has the authority to set aside only a part of the order. If, in this case, the court had set aside the entire allowable but let the remainder of the order stand, it would have been well within its jurisdiction. When the court determined the amount of the allowable by setting aside, not a part of the order but a part of the allowable, it is a clear invasion of the administrative function. This court considered the question in *White Eagle Oil Co.* v. *State Corporation Comm.*, 168 Kan. 548, 214 P. 2d 337, where the district court set aside the orders of the Commission for the reason they denied the assignment of an allowable to a well on the basis of 640 acres as attributable thereto. The court said:

> ". . . That portion of it [the order] which directed the commission after consideration to enter its order assigning to the gas well an allowable based on the attribution thereto of the north half of section ten and the south half of section 6 was incorrect. The order should have been simply that the action was remanded to the commission with directions that it further consider its order." (p. 557.)

In *City of McPherson* v. *State Corporation Commission*, 174 Kan. 407, 257 P. 2d 123, in considering the authority of the reviewing court under a similar statute, this court said:

> ". . . Its function was to consider what the Commission had considered, not to inject its own views into

what should have been considered by the Commission. The court had no authority under the statute to review the work of the Commission except in the manner and to the extent the statute gave it such authority. . . ." (p. 414.)

The power of a court to replace the Commission's orders with its own, with respect to the establishment of allowables, has been ruled on specifically by courts in other oil and gas producing states having proration. In *Marrs* v. *R. R. Commission*, 142 Tex. 293, 177 S. W. 2d 941, the district court reversed the monthly allowable orders and also held that the Commission could not set the allowables below 35,000 barrels daily. The Texas Supreme Court agreed that the allowable orders should be reversed, but as to the lower court's attempt to prescribe the terms of the Commission's allowable orders, it said:

". . . A court has the right to review the action of the Railroad Commission, and to strike its orders down if they are illegal; but it has no authority to write a proration order for the Commission, nor to prescribe the terms of a subsequent order to be entered by the Commission. . . .

"The responsibility rests with the Commission to devise some scheme of proration that will conserve the oil in the field in question, and at the same time will be fair and just and will not deprive petitioners of their property. There are many and varied methods that may be adopted by the Commission to accomplish this purpose. This necessarily involves the exercise of the discretion that has been committed by the Legislature to the Commission, and it would amount to a usurpation of the Commission's power by the court, for the court to undertake to prescribe the terms of such an order." (pp. 306, 307.) (See also *Brown et al.* v. *Humble Oil Co.*, 126 Tex. 296, 83 S. W. 2d 935, and *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.)

In connection with numerous cases pending before the court for judicial review the appellant, Panhandle, filed motions requesting the court to make findings of fact and conclusions of law. The district court overruled the motions and entered its judgments setting aside the orders of the Commission. Panhandle claims error.

G. S. 1949, 55-606, which is made applicable to the review of the Commission's orders regulating the production of gas by G. S. 1949, 55-707, makes no specific provision for findings of fact and conclusions of law by the reviewing court. The statute provides its own procedure for judicial review and the provisions of the Code of Civil Procedure are not applicable where the procedure is covered by the statute. However, the statute further provides, ". . . All actions brought under this section shall have precedence in any court and on motion shall be advanced over any civil case of different nature pending in such court, and *such action shall be tried and determined as other civil action.* . . . (Emphasis ours.) The purpose of this provision appears to be clear. Such procedural matters as are not covered by the oil and gas review statute are to be governed by the Rules of Civil Procedure as "such actions shall be tried and determined as other civil actions." Any other interpretation placed upon the provision would leave it without any force or effect.

G. S. 1949, 60-2921, provides:

> "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it, in which case the court shall state, in writing, the conclusions of fact found, separately from the conclusions of law."

This court considered the review statute in *Wakefield v. State Corporation Comm.*, 151 Kan. 1003, 101 P. 2d 880, and stated at page 1007:

". . . The twelfth sentence in providing that the district court shall not be bound by any finding of fact made by the commission, clearly indicates it was intended the district court should review the record before the commission in order to make its own independent findings of fact. . . ."

It was the failure of the trial court to make findings of fact and conclusions of law that has resulted in the voluminous record now before us. The result of the failure is well stated in Panhandle's brief as follows:

"The cross petition of Panhandle Eastern in the Finney County Court attacked the Commission's market demand determination and raised an issue of fact. We doubt very much if the court ever considered the evidence regarding market demand. As long as the trial court adhered to the view that the runs must control the allowables, any question about market demand would be academic and such review would serve no practical purpose. It is necessary, however, to preserve the issue because it is of paramount importance if the runs do not control. The attorneys for this appellant vainly endeavored to find out the basis of the decision. Because of this failure, it has been necessary to abstract in detail a most voluminous record together with all various orders, pleadings and other papers, most of which may prove to be immaterial, but which could not safely be omitted. This is exactly the situation the statute is intended to prevent. . . ."

We must conclude that if the reviewing court does not adopt the findings of fact and conclusions of law of the Commission, it must make its own findings of fact and conclusions of law upon the request of any interested party.

Other important procedural questions pertaining to piecemeal review by various parties in multiple actions in separate district courts have been raised. They have

not been ignored. However, the factual issues by which they are raised are not without dispute. The same questions are raised in the appeals in similar cases which were filed later and in which the facts are not in dispute. The remaining procedural question will be discussed in the opinion disposing of the appeals in the later cases. (*Colorado Interstate Gas Co.* v. *State Corporation Comm.*, 192 Kan. ....., ... P. 2d .....)

We may now proceed to discuss the basic issues presented.

Certain monthly allowable orders (November, 1957, through January, 1958) issued by the Commission before its report and order, effective February 1, 1958, was entered, were before the district court for review, and are before this court on appeal. However, as the Commission followed the same formula in determining these monthly allowables as it did in determining the monthly allowables after it entered its report and order, it would serve no useful purpose to extend further this lengthy opinion by a separate discussion of them. We will consider the market demand determinations and the allowables made for the months beginning March, 1958, and extending through January, 1959.

The Commission's method of determining market demand and establishing allowables for the Kansas-Hugoton Field present the basic issues.

It may be stated as a general proposition of law that the determination of market demand and establishing allowables is a responsibility which the legislature has lodged in the Commission. The courts are without jurisdiction to determine the method the Commission should use or the factors which it should consider. The courts may examine the methods used for the purpose of

determining whether the Commission has acted within the power and authority delegated to it by the legislature.

In considering the validity of the Commission's determination, the courts can consider only the statutes granting the Commission's authority and the Commission's basic order with such amendments as are properly made thereto. The determination is a question of fact. What facts are to be considered and the relative weight to be accorded them are matters left to the Commission's discretion. Unless the determination is arbitrarily or capriciously made without supporting evidence, the courts cannot interfere and substitute their judgment for that of the Commission. The question for the reviewing court is the power of the Commission to make the order; not its wisdom, propriety or expediency in having made it. (*Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.) In *City of McPherson* v. *State Corporation Commission*, 174 Kan. 407, 257 P. 2d 123, in considering the authority of the reviewing court under a similar statute, this court said:

> ". . . Its function was to consider what the Commission had considered, not to inject its own views into what should have been considered by the Commission. The court had no authority under the statute to review the work of the Commission except in the manner and to the extent the statute gave it such authority. . . ." (p. 414.)

It will perhaps be less confusing if we first consider the Commission's authority, the manner in which it determined market demand, and the evidence which it considered.

It should be noted that G. S. 1949, 55-703, is the only section in the statute pertaining to production and conservation of gas which makes direct use of the phrase

"market demand." The determination of market demand is not the end result sought by the statute. It is rather the determination of the conditions under which the Commission shall take jurisdiction of production in a gas field.

The Commission shall regulate the taking of natural gas, ". . . [1] whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or [2] whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or [3] whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, . . ." (G. S. 1949, 55-703.)

The Commission's basic order made use of the phrase "market demand" only in the following particular:

> ". . . At such time and place as the Commission shall fix, the Commission will, after notice, conduct a hearing to determine the market demand for natural gas from said field for the next six succeeding proration periods, or for such other period of time as the Commission shall prescribe, . . ."

Neither the statute nor the basic order defined "market demand." The term has rather a common understood meaning. Market demand is that amount of a commodity which the consuming public is able and willing to buy.

The word "demand" as used in a commercial sense is defined by Webster's New Century Dictionary (Unabridged) Second Edition:

> ". . . in economics, (a) the desire for a commodity together with ability to pay for it; (b) the amount

people are ready and able to buy at a certain price. Opposed to *supply*. . . ."

The price and the availability of gas in the Kansas-Hugoton Field is not a deterring market factor. However, the consuming public cannot buy unless the gas is transported from the field to the market. Therefore the market demand for gas in the Kansas-Hugoton Field must be that amount which the consuming public is able and willing to purchase, restricted to the amount which the pipeline companies in the field are able to transport to the market.

Neither the statute nor the basic order state the formula or factors which the Commission shall use in determining market demand, nor the evidence which shall be considered. These matters are left to the discretion of the Commission.

The factors which the Commission used in determining market demand, in addition to those used prior to 1956, will next be considered.

Following the issuance of the show-cause order in March of 1956, the Commission held extensive hearings covering the situation in the Kansas-Hugoton Field in general and the market demand in particular. It issued its report and order, covering the matter, effective February 1, 1958. The Commission, among other findings, found and concluded in connection with the determination of market demand:

> "A review of the Commission's past allowable orders and the evidence presented in these dockets discloses that heretofore the nominations by the purchasers from the Hugoton Field have been used and considered by the Commission as the market demand for the field. However, the evidence presented in these dockets discloses that in many instances the aforesaid nominations did not approximate the market

demand. Therefore, the Commission finds that it is necessary, in determining the market demand for natural gas from the Hugoton Field, to consider, in addition to the nominations by the purchasers, the following factors:

"(1) Takes from other sources of supply to which the purchasers are connected.

"(2) The total markets for natural gas of all purchasers from the Kansas-Hugoton Field; the rate of increase therein compared to the rate of increase in the takes from the Kansas portion of the Hugoton Field.

"(3) Takes from other sources of supply in Kansas.

"(4) Any other factors, conditions and/or circumstances that would aid the Commission in establishing the market demand."

There is ample evidence to support the Commission's conclusion that in many instances the nominations did not approximate the market demand in the field. We will not review the evidence here as it will be discussed in considering allowables. The question presented at this point is whether the Commission erroneously considered the factors quoted above in addition to the nominations by the pipeline companies.

The appellees contend that the pipeline companies' nominations are the only evidence of market demand that should be considered. We do not agree. The Commission endeavors to determine market demand for six months in the future. It must of necessity give some consideration to the entire market demand, the capacity of the pipelines in the field, possible addition of new consumers, increase in consumer demand, prospective weather conditions, and

all factors that may affect the consumer, if its determination is to have veracity.

The Commission gave consideration to the new factors mentioned in its report and order, "in addition to the nomination of the purchasers." The record does not disclose what weight the Commission gave the new factors. It is not necessary that the Commission state just what weight it gives each factor covered by the evidence. If the evidence is admissible, it is for the Commission to determine the weight it shall be given, not the courts.

It would appear that the Commission used the additional factors mentioned largely for the purpose of checking the accuracy of the nominations. We have checked the nominations against the Commission's finding of market demand for the first nine months of 1958, and find no startling difference. During the winter months, January, February, and March, while the demand was well in excess of 40,000,000 MCF, the nominations and the market demand found by the Commission were substantially the same. During the months of April through September, the monthly market demand found by the Commission exceeded the nominations by approximately 2,000,000 MCF. Panhandle, one of the major pipeline companies in the field, contends that the market demand, as determined by the Commission, is unreasonably low and that it cannot take enough gas to meet the demand of its market.

We find nothing in the record to indicate that the Commission acted arbitrarily and capriciously in determining the market demand for the field.

Appellees contend that the Commission unlawfully changed its method of determining allowables.

The only change the Commission made in determining allowables was that it ceased adding over production from wells for the preceding month to the current allowables and ceased deducting under production of wells for the preceding month from the current allowables.

It is clear that the method which the Commission used in determining market demand and calculating allowables prior to 1956, did not permit the producers to supply the market demand for gas in the Kansas-Hugoton Field and drove the pipeline companies to other fields to obtain a sufficient supply for their customers. It is clearly established by the record that from time to time during the period of 1944 to 1956, every pipeline in the field at one time or another required additional substantial amounts of gas to supply their added markets but that the gas could not be obtained from the Kansas-Hugoton Field because of the Commission's method of determining market demand and calculating allowables and that they were therefore forced to go to other fields for their supply. Counsel for Northern Natural stated in oral argument before this court that the company had at times taken on additional territory requiring a substantial amount of additional gas but that because the market could not be supplied from the Kansas-Hugoton Field, under the Commission's orders, they went to other sources of supply for their requirements.

Later, and in accordance with its Report and Order effective February 1, 1958, the Commission ceased deducting underages occurring from well which had not produced the previous months allowable and by so doing arrived at an allowable which represented the true demand for gas in the field.

There is nothing in the Gas Conservation Statute nor in the Commission's basic order which authorizes the Com-

mission to deduct past underages from current allowables which were determined to be necessary to supply the market demand. Such a practice would permit, and did permit, one major pipeline company to reduce its takes and force the same reduction on every other pipeline company in the field regardless of the market demand requirements as a whole.

The Commission stated the fallacy in the old method of determining current allowables and set out the proper formula to be followed in its Report and Order effective February 1, 1958:

> "The market demand figure, once obtained, heretofore was used to determine the current allowable to be assigned by the Commission to the field. Prior to May, 1956, the current allowable was determined by taking the market demand, first adding thereto the cancelled underages for the previous month and then subtracting therefrom the amount of underproduction or adding thereto the amount of overproduction for the previous month. The result of the use of this method was that in actuality the runs or takes from the field controlled the amount of the current allowable; the control of the market demand and current allowable was entirely exclusively in the hands of the purchaser pipeline companies, and not in the Commission.
>
> "The Commission, in an effort to take control, deviated from this formula of determining current allowables and for August, 1956, and subsequent months has fixed current allowables by taking the market demand figures, still based exclusively on nominations of the purchasers, and adding thereto the cancelled underproduction for the previous month. Actually, except for the consideration of a small amount of cancelled underproduction, the market demand, based solely on the nominations of the purchasers, was the current allowable for the field. The current allow-

able for each well was calculated in accordance with the provisions of paragraph (1) of the Basic Order for the Hugoton Gas Field. Each well continued to carry in addition to its current allowable such underproduction or overproduction as may have accrued to it. The result was the net allowable for each well. The sum total of the net allowables of the wells therein represented the net allowable for the entire field.

"To restate this formula, allowables in the future will be determined as follows: Consider the factors as discussed in paragraph 16 above and arrive at the market demand figure; add to it the cancelled underages, and the result will be the current monthly allowable. (This is the amount that is ratably apportioned to the wells each month.) To ascertain the net allowable for the field as a whole, add the total net underage or subtract the total net overage. The resulting figure is the field total net allowable on that date.

"The field as a whole is never exactly in balance. It is to be expected that for some periods of time it will have a total net underage and for other periods of time it will have a total net overage."

Much confusion has arisen because of misuse or misunderstanding of descriptive terms. The briefs of appellees in setting out comparative schedules for the court's consideration confuse nominations with the Commission's finding of market demand and confuse current allowables with net allowables.

The current allowable, which is spread to all of the wells in the field, consists of the market demand as found by the Commission plus cancelled underages for the previous month. The practice of adding cancelled underages is in accordance with the basic order and does not appear to be challenged.

The net allowable consists of the current allowable plus underages pertaining to specific wells which have not been cancelled. Such underages have been allocated in past months and was only available to the wells to which it was previously allocated. Such wells have an opportunity to produce the underage in addition to the current allowable if they can do so before the specified time for cancellation.

The Commission's method of determining current allowables, as stated above, complies with the law and the basic order.

The appellees contend that the Commission was influenced in its determinations by the fact that gas from the Kansas-Hugoton Field was draining or would drain into the Guymon-Hugoton Field in Oklahoma, and be wasted or lost insofar as the Kansas well owners and royalty owners are concerned. This was a proper matter for the Commission to consider under the circumstances.

The Commission found, and there was ample evidence to support the findings, that because of its past methods of determining market demand and calculating allowables, the producers in the Kansas-Hugoton Field had not been able to produce the market demand and the pipeline companies had been forced to go to other fields, including the Guymon-Hugoton Field, to supply their market. The gas in the Guymon-Hugoton Field was being depleted and the pressure was declining at a much faster rate than in the Kansas-Hugoton Field. Drainage is bound to result.

This court would not place its approval on an order of the Commission which had as its purpose the drainage of gas from Oklahoma into Kansas. However, the Commission should not be criticized for correcting an improper method of establishing allowables which created a situation under which Kansas gas was caused to drain into Oklahoma.

There is no quarrel or conflict of jurisdiction between the two states. The Oklahoma authorities have done nothing to create the unfortunate situation which exists in the Kansas-Hugoton Field. The situation was created by the allowable orders of the Kansas Commission and should be corrected by it insofar as reasonably possible under the law.

The appellees contend that the change in the Commission's method of calculating allowables will cause inequitable or unfair taking among the producers in the field. The right of the pipeline companies to challenge matters which do not affect them but affect only the producers and royalty owners is somewhat questionable. The producers have not participated in the litigation, but the royalty owners have filed extensive briefs in support of the Commission's orders. We will, however, discuss the contention.

The Commission has three responsibilities under the Gas Conservation Statute. It must first of all prevent waste of the natural resource. It must allow sufficient production to meet the market demand if such can be done without waste. It must protect correlative rights.

In a gas field such as the Kansas-Hugoton where five major companies are taking gas through separate pipelines not connected to the same wells, the responsibilities placed upon the Commission will clash. If the market demand cannot be supplied without waste, or if correlative rights cannot be protected without waste, or if correlative rights cannot be protected without unduly restricting production needed for the market demand, one of the three, waste, market demand, or correlative rights, must suffer. The dominant purpose of the Gas Conservation Statute is to prevent waste. (*Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704.)

The Commission cannot require or guarantee that each well owner will produce and sell his entire allowable. The Commission is required to afford each owner the "right or opportunity" to produce his share. As far as the Commission's duty under the basic order goes, it is fulfilled when each owner is legally "free to produce" and not denied the "right or opportunity" to produce his allowable.

The Commission could not be required to shut in an entire gas field to protect correlative rights where some of the producers desired to cease production and hold a gas field for a reserve. The Commission could not be required to unduly restrict production in a gas field because some producers desired to deplete the gas at a very low rate regardless of the reason.

When waste, market demand, and correlative rights are in conflict the Commission must determine which is to be given preference. If the decision of the Commission is supported by evidence, the courts cannot interfere.

The orders of the Commission, under consideration, are not subject to the objection that they do not properly protect correlative rights under the facts disclosed by the record.

The appellees contend that the orders of the Commission violate the commerce clause of the federal constitution and the Natural Gas Act.

Our attention is called to the fact that the subject of regulating interstate commerce is committed by the United States Constitution to the control of the federal government. (*Oklahoma v. Kansas Nat. Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, 31 S. Ct. 564; *Penna. v. West Virginia*, 262 U. S. 553, 67 L. Ed. 1117, 43 S. Ct. 658; and *Penna. Gas Co. v. Pub. Service Comm.*, 252 U. S. 23, 64 L. Ed. 434, 40 S. Ct. 279.) Also, that the states have no authority, even in the

absence of federal legislation, to regulate sales of gas for transportation and resale in interstate commerce. (*Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 68 L. Ed. 1027, 44 S. Ct. 544; *Pub. Util. Comm.* v. *Attleboro Co.*, 273 U. S. 83, 71 L. Ed. 549, 47 S. Ct. 294; and *State Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321.) We are further informed that the states cannot so regulate under its police power as to place an undue burden on interstate commerce. (*Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239, 42 S. Ct. 106; and *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, 42 S. Ct. 244.)

No one appears to question these general propositions of law. However, they are not applicable here. The Commission's orders are not directed to the pipeline companies. The pipeline companies are not required to do anything, neither are they restricted in any way. None of the pipeline companies, except Panhandle, claim they are not able to take enough gas under the Commission's order to meet their present market demands. Panhandle is before this court in support of the Commission's action.

The facts in this case present a much different situation than those which existed in *Northern Natural Gas Co.* v. *State Corp. Comm'n of Kansas*, 372 U. S. 84, 9 L. Ed. 2d 601, 83 S. Ct. 646. In the Northern Natural Gas case the Commission's order was directed to the pipeline company in an attempt to force it to take gas ratably from the wells to which it was connected in the Kansas-Hugoton Field.

The Commission's orders now before us are addressed only to the producers. The producers are not complaining and the royalty owners are supporting the Commission's action. The Commission's orders in no way attempt to regulate the sale or transportation of gas. The Supreme Court of the United States clearly stated the applicable law

in *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559:

> "Plaintiff contends that the Act and proration orders operate to burden interstate commerce in crude oil and its products in violation of the commerce clause. [U. S. Const. art. I, § 8.] It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products. Such production is essentially a mining operation and therefore is not a part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce. *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 178. *Hope Gas Co.* v. *Hall*, 274 U. S. 284, 288. *Foster Packing Co.* v. *Haydel*, 278 U. S. 1, 10. *Utah Power & Light Co.* v. *Pfost*, supra. No violation of the Commerce clause is shown." (p. 235.)

Appellees contend:

> "It is abundantly clear . . . that the jurisdiction over sales of natural gas for resale in interstate commerce pursuant to the Natural Gas Act is exclusively in the Federal Power Commission. The Natural Gas Act was passed pursuant to the Commerce Clause contained in the United States Constitution and obviously was intended to occupy the entire area—the area involved in the instant appeals."

The Natural Gas Act and the decisions do not support the contention. Congress has not occupied the field in the area of state control of the production of natural gas. The Natural Gas Act specifically exempts from its coverage the production or gathering of natural gas. (15 U.S.C.A. § 717b.)

In *Panhandle Pipe Line Co.* v. *Comm'n*, 332 U. S. 507, 92 L. Ed. 128, 68 S. Ct. 190, the court reviewed the legislative history of the Natural Gas Act and said:

". . . Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." (p. 516.)

The court further said:

"Moreover, this unusual legislative precision was not employed with any view to relieving or exempting any segment of the industry from regulation. The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions." (p. 517.)

The regulation of the production of gas was clearly left within the jurisdiction of the states.

The appellees last contend that the orders of the Commission violate the fourteenth amendment to the United States Constitution which provides, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." and article 1, section 10 which provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

Appellee's contention appears to be bottomed on the proposition that they have contracts to purchase the gas produced from certain leases in the field and they therefore have the right to determine the allowable production therefrom through their nominations, without interference by the Commission. Also, that their gas purchase contracts have various provisions which may be affected if their ability to determine the allowables is disturbed.

Individuals cannot by private contracts destroy the right of the state to exercise reasonable police power for the welfare of the public. It has been said, ". . . that an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it, upon the ground that its later exercises deprive of property or invalidate those contracts. *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467 [55 L. Ed. 297, 31 S. Ct. 265, 34 L.R.A. (N. S.) 671.]" (*Thornton* v. *Duffy*, 254 U. S. 361, 369, 65 L. Ed. 304, 41 S. Ct. 137.) (See also, 16 C.J.S., §§ 180-182, 913 and 917, Constitutional Law; *Phillips Petroleum Co.* v. *Jenkins*, 297 U. S. 629, 80 L. Ed. 945, 56 S. Ct. 611; *Bennett* v. *Corporation Commission*, 157 Kan. 589, 142 P. 2d 810; *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403.) The appellees do not complain that the production of gas is being over-regulated by undue restrictions. They rather complain that the field is being under-regulated. Private individuals cannot by private contracts obtain a vested right in a police or public welfare statute. The Kansas Legislature could repeal the Gas Conservation Statute if it thought such action advisable.

There are no purchase contracts shown in the record. The standard gas purchase contracts which have been before this court contain a provision making the contract subject to all present and future valid orders of regulatory bodies.

There is no statute or provision in the basic order providing that, regardless of the evidence presented at the market demand hearings, the Commission must allow past under production to control future allowables. The Gas Conservation Statute and basic order both require the Commission to determine the market demand and establish current allowables based on the evidence presented at the market demand hearings.

The Commission is, and of necessity must be, free to correct past errors. Orders may have been entered with full confidence that they would effectuate the legislative mandate, but twelve years of irrefutable experience demonstrated that something was wrong.

In *Continental Investment Corp.* v. *State Corporation Comm.*, 156 Kan. 858, 137 P. 2d 166, this court said that:

> "... Of necessity all administrative rules of official boards are experimental, and their wisdom and justice or lack of it may only be revealed by trial and error. That is the main reason the legislature conferred on such official boards the power to make rules having temporarily the force of law. Otherwise there would be no excuse for the legislature placing that responsibility on an official board when the power and duty to legislate is vested in the legislature itself. The legislative device of assigning to official boards or commissions the powers to make administrative rules governing matters of public concern, with authority to change those rules as experience may justify, is a settled policy in American jurisprudence...." (p. 866.)

In reviewing another rule of the Commission, under the Gas Conservation Act, this court held that:

> "... [The] rules and regulations of the commission are never *res judicata*. Should bad consequences follow from such an order being made the commission might change it to meet conditions as they exist." (*Aylward Production Corp.* v. *Corporation Commission*, 162 Kan. 428, 440, 176 P. 2d 861.)

Furthermore, the orders before the Commission did not repeal or change its basic rules or regulations. There never was a rule containing the word "nominations," much less saying that nominations had to be accepted as the market demand. There never was a rule implying that the

Commission was required to reduce its finding of market demand by the amount of past under-production.

We find nothing in the record which would justify the district court's judgment setting aside the orders of the Commission.

The judgment is therefore reversed with instructions to dismiss the petitions for review challenging the allowable orders of the Commission for gas production in the Kansas-Hugoton Field entered prior to and including October, 1957, and with directions to approve the allowable orders entered during the period November, 1957, through January, 1959, inclusive.

APPROVED BY THE COURT.

Topeka, Friday, January 3, 1964

41,515, 41,555, 42,175, 42,176, 42,185, 42,230	Colorado Interstate Gas Company, Appellee, v. State Corporation Commission of Kansas, et al., Appellants.	Motion by Colorado Interstate Gas Co., for Rehearing is Denied.
41,515, 41,516, 41,555, 41,556	Northern Natural Gas Company, Appellee, v. State Corporation Commission of Kansas, et al., Appellants.	Motion by Northern Natural Gas Co. for Rehearing is Denied.

APPENDIX B

Opinion and Judgment of the Kansas Supreme Court in the Second Set of Appeals

Nos. 42,175, 42,176, 42,185, 42,230 (Consolidated)

COLORADO INTERSTATE GAS COMPANY, NORTHERN NATURAL GAS COMPANY, CITIES SERVICE GAS COMPANY, and KANSAS-NEBRASKA NATURAL GAS COMPANY, *Appellants* and *Cross-Appellees* v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee* and *Cross-Appellant*, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, each a corporation, *Appellees*.

No. 42,038

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, a corporation, *Appellee* and *Cross-Appellant* v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee*, PANHANDLE EASTERN PIPE LINE COMPANY, a corporation, *Appellee* and *Cross-Appellant*, CITIES SERVICE GAS COMPANY, *Appellant* and *Cross-Appellee*, NORTHERN NATURAL GAS COMPANY, and KANSAS-NEBRASKA NATURAL GAS COMPANY, each a corporation, *Appellees* and *Cross-Appellants*.

SYLLABUS BY THE COURT

1. GAS—*Judicial Review of Commission's Orders.* The statute, G. S. 1949, 55-606, providing for judicial review of orders made by the State Corporation Commission in administering the Gas Conservation Act, contemplates but one judicial review of such orders regardless of the number of parties aggrieved.

2. COURTS—*Concurrent Jurisdiction—Court Acquiring Jurisdiction First.* The district court, which first acquires jurisdiction of a petition to review an order of

the Commission, has exclusive jurisdiction of the subject matter and the rights of the parties affected thereby, and a court of concurrent jurisdiction is without authority to entertain a subsequent petition for review of such order.

3. STATUTES—*Gas Conservation Act—Dual Subjects—Validity.* The 1959 amendment to the Gas Conservation Act being Chapter 237 of the Laws of 1959, now G. S. 1961 Supp., 55-703, does not contain dual subjects and the subject is sufficiently expressed in the title. It is not an unconstitutional delegation of legislative authority, and is not in violation of the due process and equal protection clauses of the federal and state constitutions.

Appeals from Finney district court, ROLAND H. TATE, judge. Opinion filed November 2, 1963. Reversed with directions. (Consolidated cases.)

Appeals from Stevens district court, L. L. MORGAN, judge. Opinion filed November 2, 1963. Affirmed. (No. 42,038.)

Malcolm Miller, of Wichita, argued the cause, and *L. M. Poe*, of Colorado Springs, Colorado, *Carl T. Smith* and *Stuart R. Carter*, both of Wichita, were with him on the briefs for appellant, Colorado Interstate Gas Company.

Mark Adams, of Wichita, argued the cause, and *Conrad C. Mount*, *John T. Grant*, *George E. Peabody* and *Charles V. Wheeler*, all of Oklahoma City, Oklahoma, *D. B. Lang*, of Scott City, *Lawrence I. Shaw*, *F. Vinson Roach* and *Patrick J. McCarthy*, all of Omaha, Nebraska, *Ray H. Calihan*, *Logan N. Green*, *Daniel R. Hopkins* and *Ray H. Calihan, Jr.*, all of Garden City, *Charles E. Jones*, *William I. Robinson*, *J. Ashford Manka*, *Clifford L. Malone*, *Mark H. Adams, II*, *John S. Seeber*, *Floyd E. Jensen* and *Joe Rolston*, all of Wichita, were with him on the briefs for the appellants, Northern Natural Gas Company, a Corporation and Cities Service Gas Company, a Corporation.

Douglas Gleason, of Ottawa, argued the cause, and *James D. Conway* and *Elmer J. Jackson*, both of Hastings, Nebraska, *Thomas E. Gleason* and *Jules V. Doty*, both of Ottawa, and *Hollis B. Logan*, of Topeka, were with him on the briefs for the appellant, Kansas-Nebraska Natural Gas Company, Inc.

Richard C. Byrd, of Ottawa, argued the cause, and *J. Robert Wilson*, *John D. Townsend*, *Robert C. Londerholm*, *Charles R. Escola*, *Charles C. McCarter*, *Rex A. Jemison*, *Carl L. Wettig*, and *Glenn D. Young*, all of Topeka, were with him on the briefs for the appellee, The State Corporation Commission of the State of Kansas.

Robert T. Cornwell, of Wichita, argued the cause, and *David W. Buxton*, *Wayne E. Coulson*, *Paul R. Kitch*, *Dale M. Stucky*, *Donald R. Newkirk*, *Gerrit H. Wormhoudt*, *Philip Kassebaum*, *John E. Rees*, *Robert J. Hill*, *Willard B. Thompson*, *Hugo T. Wedell*, and *Homer V. Gooing*, all of Wichita, *A. E. Kramer* and *Bernard E. Nordling*, both of Hugoton, were with him on the briefs for the appellee, Southwest Kansas Royalty Owners' Association.

Chas. Vance, of Liberal, argued the cause, and *C. C. Linley*, of Liberal, *Wendell J. Doggett* and *C. A. Conoley*, both of Kansas City, Missouri, and *Jeff A. Robertson*, of Topeka, were with him on the briefs for the appellee, Panhandle Eastern Pipe Line Company.

The opinion of the court was delivered by

HATCHER, C.: These appeals are from judgments rendered on petitions to review the orders of the State Corporation Commission determining the market demand for natural gas in the Kansas-Hugoton Gas Field for the six-months period beginning October 1, 1959, and extending through March 31, 1960, and also the monthly allowable for each month of such period.

The orders were litigated in two forums. The district court of Stevens County, Kansas, entertained separate petitions to review filed by Panhandle Eastern Pipeline Company (Panhandle) and Southwest Kansas Royalty Owners' Association (Royalty Owners'). The challenged the orders, contending that the determination of market demand and allowable production was unreasonably low. The district court of Finney County, Kansas, entertained separate petitions to review filed by Northern Natural Gas Company (Northern Natural), Cities Service Gas Company (Cities Service), Colorado Interstate Gas Company (Colorado Interstate), and Kansas-Nebraska Natural Gas Company (Kansas-Nebraska). They challenge the orders contending, among other things, that the determination of market demand and allowable production was unreasonably high. (The parties will hereinafter be identified as indicated in the parentheses.)

The separate petitions for review filed in the Finney County District Court were consolidated for hearing. The separate petitions for review filed in the Steven[illegible]ounty District Court were also consolidated. All the a[illegible]s involve the same orders and the same record. They will be considered in a single opinion.

The questions presented by these appeals were determined in *Colorado Interstate Gas Co.* v. *State Corporation Comm.*, (41,515), 192 Kan. ....., ... P. 2d ..... insofar as they challenge the Commission's orders for the reason that they are not supported by a substantial competent evidence; they violate the provisions of the Gas Conservation Act or the Commission's basic order; they constitute an interference with interstate commerce; they invade the province of the Federal Power Commission under the Natural Gas Act, or they violate the due process clause of the United States Constitution or impair the obligation of

contracts. Undue repetition will be avoided if we incorporate that opinion here by reference as determinative of the issues mentioned. We do so.

There remains for determination the jurisdictional dispute between the two district courts, and the constitutionality and effect of G. S., 1961 Supp., 55-703, which amended G. S. 1949, 55-703.

On December 15, 1959, following the overruling of petitions for rehearing, Royalty Owners' filed petitions for judicial review of the market demand order and the October allowable order in the district court of Stevens County, Kansas. On December 16, 1959, Panhandle filed similar petitions for review in the same court. Subsequent thereto, Northern Natural, Cities Service, Colorado Interstate, and Kansas-Nebraska filed petitions for judicial review, respectively, of each of said orders in the district court of Finney County, Kansas. Thereafter, all six parties filed their several petitions for judicial review of each of the other monthly allowable orders, covering the period involved, in their chosen jurisdiction.

It would serve no useful purpose to review the various motions filed by the parties in an effort to bring all parties before the court of their preferred jurisdiction, or the orders in connection therewith.

It should be noted that the district court of Stevens County, subsequent to the hearing on the merits, ruled that the Commission's order is not subject to piecemeal review from case to case and court to court.

The district court of Finney County, subsequent to the hearing on the merits, ruled that each party was entitled to maintain a separate proceeding for review and that the only parties to the proceedings were those named in the captions of the petitions for review.

The district court of Stevens County held a hearing on February 13, 1960, at which Northern Natural, Cities Service, and Colorado Interstate did not appear, although they received notice. On March 10, 1960, the court entered its judgment in which it found:

> "That the Report and Order dated November 10, 1959, and subsequent allowable orders of the State Corporation Commission are based on substantial competent evidence and are lawful and valid. Said report and order makes reasonable provisions for an orderly process correcting inequities (existing for more than ten years and which have progressively increased) discriminating in favor of the correlative rights of producers and royalty owners in the Oklahoma Hugoton Gas Field and against those in the Kansas Hugoton Gas Field; as provided by the Statutes of Kansas, Section 55-703, 1959 supplement."

The judgment of the district court of Stevens County affirmed the orders in controversy.

The district court of Finney County held a hearing on February 23, 1960. Panhandle and Royalty Owners' were not permitted to participate because they had not filed petitions for review in that court. On May 25, 1960, the court entered its judgment holding valid the market demand order for the six-months period beginning October 1, 1959, extending through March 31, 1960. It further ordered that:

> ". . . the several monthly proration orders entered by the State Corporation Commission for October, 1959, monthly, through March, 1960, should be, and the same are hereby, reversed and set aside insofar as the net allowables there set forth are greater by virtue of underages, either canceled or carried forward as a result of the Commission's departing from its former method of determining allowables beginning May, 1956, to October 1, 1959; and such monthly

proration orders entered by the State Corporation Commission for the months of October, 1959, through March, 1960, are affirmed insofar as such orders disclose market demand and current allowables without adjustment to runs as determined by the Commission and net allowable determined by adding underage or subtracting overage from current allowable, so long as such underage or overage accrued since October 1, 1959; . . ."

It would serve no useful purpose to take time and space to align the parties as they appear before this court with their numerous appeals and cross-appeals. We will proceed to determine the jurisdictional questions presented.

Before an action may be brought by any party to a proceeding resulting in an order by the Commission, a petition for rehearing must first be filed with the Commission under the provisions of G. S. 1949, 55-606. The statute provides further:

". . . Such action may be brought by any person aggrieved, whether or not such person was the applicant for rehearing, within thirty days after the denial of the petition for rehearing, or, if rehearing is granted, then within thirty days after the final decision by the commission. . . ."

Once the petition for rehearing is concluded, any person aggrieved, whether or not such person filed a petition for rehearing, may file a petition for judicial review. One application for rehearing will suffice for all. The statute does not anticipate that the Commission need be troubled by petitions for rehearing on the part of all the parties or persons that may be interested in an investigation or hearing, or aggrieved by the order resulting therefrom.

The statute contemplates but one action or petition for review of an order of the Commission. It does not antic-

ipate separate actions by separate parties in different courts where a single order is involved. Once a petition for review is filed in a Court of competent jurisdiction, all interested parties may intervene and protect their rights.

The parties interested in the hearing out of which the orders in this controversy grew are numerous and varied. Many are aggrieved. The reviewing court is not concerned with individual grievances of numerous parties or with resolving disputes between parties. Its sole responsibility is to review and determine the validity of the Commission's order.

The district court of Finney County was of the opinion that each party aggrieved by an order of the Commission was entitled to maintain a separate petition to review an order of the Commission and that such separate actions could be brought in any county of proper venue. The statute does not so provide. That part of G. S. 1949, 55-606, material to this question states:

> "Any action for judicial review of any . . . order or . . . may be brought . . . in the district court of any county in the state wherein the property affected thereby is located, or, if the property affected thereby is located in different counties, then the jurisdiction shall lie in either of such counties. . . ."

If the property affected by the order is located in different counties, the jurisdiction to review the order will lie in either, not both. In *Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 176 Kan. 561, 271 P. 2d 1091, it was held in paragraph 2 of the syllabus:

> "The primary purpose and intent of creating a court of judicial review, as a part of the oil and gas conservation act, in which actions may be brought to review any rule, regulation, order or decision of the state corporation commission was: (*a*) To require

interested parties to present their evidence and contentions to such commission; and (*b*) to eliminate the uncertainty and confusion which could, and probably would, result from the filing of numerous independent actions by the various parties affected by an act, or acts, of the commission, when in such independent actions the court would be deprived of the benefit of the complete record on which the action of the commission was based."

The law is well settled that where there is concurrent jurisdiction in more than one court the court which first acquires jurisdiction retains it to the exclusion of another court which is requested or seeks to assume it. (*Hoard* v. *The Home State Bank*, 176 Kan. 624, 272 P. 2d 1054; *Shields* v. *Fink, Executrix*, 190 Kan. 17, 372 P. 2d 252; *Walker* v. *McNut*., 165 Kan. 533, 196 P. 2d 163; *Charvat* v. *Moore*, 167 Kan. 336, 205 P. 2d 980.) The court first acquiring jurisdiction may draw to itself all the issues and enjoin parties from litigating them elsewhere. (*Graves* v. *National Mutual Cas. Co.*, 164 Kan. 267, 188 P.2d 945.)

The district court of Stevens County first acquired jurisdiction to review the market demand order for the period beginning October 1, 1959, and extending through March 31, 1960, and the October and November, 1959, allowable orders. The district court of Stevens County, could have drawn all the issues to it and enjoined the parties from proceeding in another court of concurrent jurisdiction.

The district court of Finney County was without jurisdiction to review the orders.

The 1959 amendment to the Gas Conservation Act being Chapter 237 of the Laws of 1959, now G. S., 1961 Supp., 55-703, is challenged on numerous constitutional grounds. It is first contended that the act is in violation of section

16, article 2, of the Constitution of the State of Kansas, which reads: "No bill shall contain more than one subject, which shall be clearly expressed in its title. . . ."

The title to the act reads: "An act relating to the production and conservation of natural gas; amending section 55-703 of the General Statutes of 1949, and repealing said original section."

The amendment which is subject to the challenge here is found in the last proviso of the act which reads:

> ". . . *Provided further, however,* That the provisions of this act shall not apply to any common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. *The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand.*" (The italics identify the amendment which was added.)

The title to the act is broad enough to cover any provision relating to the production and conservation of natural gas. Insofar as the determination of market demand is material to the conservation of natural gas, it is included in a title relating to the production and conservation of natural gas.

A title is sufficient if it indicates clearly, though in general terms, the scope of the act. The more general the language of the title, the broader the subject matter of the act may be. It is not necessary that the title be an index, a synoposis, or an abstract of the entire act in all its details. The purpose of the title is to inform the legislature and the general public of the subject under consideration.

The contention that the act deals with unrelated subjects cannot be sustained. The determination of market demand is pertinent to the regulation of production and conservation of gas. In determining the market demand for gas from a common source of supply, the consideration of factors, conditions, or circumstances that would aid in establishing the market demand are germane to regulating production and conservation of gas.

Those who are interested in pursuing further the construction, purpose, and effect of section 16, article 2, of the Constitution of the State of Kansas should see *In re Sanders, Petitioner*, 53 Kan. 191, 36 Pac. 348; *Ratzbone* v. *Hopper*, 57 Kan. 240, 45 Pac. 610; *State, ex rel.*, v. *McCombs*, 129 Kan. 834, 284 Pac. 618; *City of Lawrence* v. *Robb*, 175 Kan. 495, 265 P. 2d 317; *State, ex rel.*, v. *Kansas Turnpike Authority*, 176 Kan. 683, 273 P. 2d 198; *State, ex rel.*, v. *Urban Renewal Agency of Kansas City*, 179 Kan. 435, 296 P. 2d 656; *State, ex rel.*, v. *City of Wichita*, 184 Kan. 197, 335 P. 2d 786; and *Water District No. 1* v. *Robb*, 182 Kan. 2, 318 P. 2d 387.

It is contended that the act constitutes an unlawful delegation of legislative authority.

The 1959 amendment (G. S., 1961 Supp., 55-703) did not delegate any additional authority to the Commission requiring new standards to guide it. Rather it designated standards which were appropriate for the Commission to use in exercising the authority previously granted. (G. S. 1949, 55-703.)

If the Commission was to determin market demand six months in advance, certainly it was necessary for it to consider the market demand without the state, as very little of the gas was sold within the state. The Commission was also obligated to consider "such other factors,

conditions or circumstances" as would aid it in properly determining the market demand.

The determination of market demand under the provisions of G. S. 1961 Supp., 55-703, is chiefly for the purpose of determining when the Commission shall take jurisdiction of a gas field. The Commission shall exercise jurisdiction "whenever the available production of natural gas from any common source of supply is in excess of the market demands" and other conditions exist. In *Water District No. 1* v. *Robb*, 182 Kan. 2, 318 P. 2d 387, it was held:

> "While the legislature cannot delegate its constitutional power to make a law (Article 2, Section 1, Kansas Constitution), it can make a law which delegates the power to determine some fact or state of things upon which such law shall become operative." (Syl. 6.)

In *State, ex rel.*, v. *Fadely*, 180 Kan. 652, 308 P. 2d 537, it was held:

> "The legislature may not delegate its power to make laws but may enact a law in general terms which confers upon an officer or board administrative duties to enforce and apply the law, and, to accomplish that end, to ascertain the existence or non-existence of some future fact, event or condition which the officer or board is required to ascertain; but, the statute must prescribe reasonably clear standards by which those vested with the duty to make the statute operate will do so in the manner intended. Where, however, the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety or general welfare, and it is impossible or impracticable to provide such standards and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations." (Syl. 7.)

In *The State* v. *Railway Co.*, 76 Kan. 467, 92 Pac. 606, affirmed *Mo. Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262, 54 L. Ed. 472, 30 S. Ct. 330, the court had under consideration the constitutionality of the Article 3, Chapter 84 of the General Statutes of 1901, creating a Board of Railroad Commissioners, now the State Corporation Commission. The statute placed upon the board the responsibility of determining a "reasonable charge for services rendered" by railroads. (G. S. 1901, Sec. 5981.) The term "reasonable charge" was not defined, nor were there any standards by which reasonable charges were to be determined. The court, in considering the general constitutionality of the act, held:

> "The act does not delegate to the board of railroad commissioners legislative powers. The legislature in the exercise of its power to regulate and control public corporations, such as common carriers, may delegate to a board of railroad commissioners certain functions administrative in character which cannot well be performed by the legislature itself." (Syl. 2.)

G. S. 1961 Supp., 55-703 does not contain any unlawful delegation of legislative authority.

G. S. 1961 Supp., 55-703 does not violate the due process and equal protection clauses of the federal and state constitutions.

We stated in *Colorado Interstate Gas Co.* v. *State Corporation Comm.*, (41,515), 192 Kan. ....., ... P. 2d ....., that the Commission was obligated to consider evidence of all factors which were pertinent to the determination of market demand under the provision of G. S. 1949, 55-703. This necessarily included all factors mentioned in the last proviso of G. S. 1961 Supp., 55-703. The

Commission's abandonment of the practice of deducting past monthly underages from current allowables was also approved. The constitutional objections raised in connection with the two matters were fully considered and determined. It would serve no useful purpose to repeat here what was said in that case.

The question is presented, if the Commission was permitted or obligated under the provisions of G. S. 1949, 55-703, to consider the factors mentioned in the last proviso of G. S. 1961 Supp., 55-703, in determining market demand, why the amendment? An examination of the record and the contentions made in the briefs clarify the matter.

The Commission for many years had considered only the nominations of the pipeline companies in determining market demand. It finally became apparent to the Commission that its method of determining market demand and calculating allowables had no relation to the actual market demand in the field, and that the field was being detrimentally affected by its restrictive determinations and calculations. When the Commission attempted to make corrections by considering all material factors, its orders were set aside by a district court.

The legislature desired to make it crystal clear to both the Commission and the courts, that the Commission was to consider all pertinent factors in making its calculations and determinations.

The judgment of the district court of Finney County is reversed with instructions to dismiss the petitions for review of the orders described herein.

The judgment of the district court of Stevens County is affirmed.

APPROVED BY THE COURT.

Topeka, Friday, January 3, 1964

42,175, 42,176, 42,185, 42,230, 42,038	Northern Natural Gas Co., and Cities Service Gas Co., Appellants, v. State Corporation Commission of Kansas, et al., Appellees.	Motion by Appellants for Rehearing is DENIED.

APPENDIX C

(1)

Judgments of the District Court of Finney County, Kansas, in the First Set of Appeals

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS.

COLORADO INTERSTATE GAS COMPANY, Petitioner, v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Respondent, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, Intervenors.	CASES NOS. 10,464, 10,469, 10,479, 10,486, 10,491, 10,501, 10,519, 10,520, 10,538, 10,544, 10,553.

Journal Entry and Judgment.

These eleven petitions for review filed by Colorado Interstate Gas Company came on for argument before The Honorable Roland H. Tate, Judge of the District Court of Finney County, Kansas, on October 15, 1958, the petitioner being represented by its counsel L. M. Poe, Robert C. McHugh, Ray H. Calihan, Stuart R. Carter and Malcolm Miller; the respondent being represented by its counsel Clyde E. Milligan and J. Robert Wilson; the intervenor Panhandle Eastern Pipe Line Company being represented by its counsel C. C. Linley; and intervenor Southwest Kansas Royalty Owners Association being represented by its counsel Dale M. Stucky.

One of such petitions for review, No. 10,469, was timely taken from a general order of the State Corporation Commission effective February 1, 1958, in which the Commission construed the interim orders entered by it monthly since May of 1956 and ending with November, 1957, and set forth as a matter of policy how the State Corporation Commission expected, following certain factors set forth in such order, to determine the market demand for Kansas Hugoton gas in any given proration period.

The first of the petitions for review was timely filed by Colorado Interstate to obtain a review of the last of such interim orders referred to hereinabove, issued for November of 1957. All the other petitions for review were timely taken from the monthly orders entered by the State Corporation Commission for the months of December, 1957, through August, 1958.

The Court permitted Panhandle Eastern Pipe Line Company and Southwest Kansas Royalty Owners Association to intervene in all of the proceedings in all of the different petitions for review separately docketed. The Court, upon application of Colorado Interstate, entered a stay order staying execution of enforcement of each of the monthly orders, beginning November, 1957, and ending August, 1958, insofar as the allowables established in such orders were in excess of the allowables which would have been established under the method of calculating allowables used by the State Corporation Commission in the Kansas Hugoton Field at all times prior to May 1, 1956. There is no contest in these proceedings concerning the allowance of intervention, the timeliness of the petitions for review, or the propriety of the stay orders.

At the argument of the various causes, petitioner Colorado Interstate Gas Company filed its brief. At the con-

clusion of the argument, the Court granted time to the State Corporation Commission and to intervenors Panhandle Eastern Pipe Line Company and Southwest Kansas Royalty Owners Association to file responsive briefs, after which the Court allowed petitioner Colorado Interstate Gas Company time to file a reply brief. All such briefs have been filed within the time allotted or as extended by the Court.

The Court, having reviewed the files and the pleadings, the transcript of the proceedings filed herein and having heard the arguments of counsel for the respective parties and intervenors and having studied the briefs submitted by the respective parties and intervenors, finds that the general order of the Corporation Commission effective February 1, 1958, is void and should be set aside.

The Court further finds that the interim orders hereinabove referred to and the monthly proration orders hereinabove referred to are void and should be set aside and that the allowables set forth in such orders, insofar as they are in excess of the allowables which would have been determined upon the method of calculating allowables used by the State Corporation Commission prior to May of 1956, are void and should be set aside.

It Is Therefore Ordered and it is the judgment of the Court that the interim orders issued by the State Corporation Commission, beginning in May, 1956, and ending with November, 1957, and all of the monthly proration orders, beginning with December, 1957, and ending with August, 1958, must be, and the same are hereby, reversed and set aside and the allowables set forth therein are void insofar as they are in excess of the allowables which would have been established under the method of calculating allowables used by the State Corporation Commission prior to May of 1956.

It Is the Further Order of the Court and the Court's judgment that the general order issued by the State Corporation Commission effective February 1, 1958, must be, and the same is hereby, set aside and reversed.

Dated this 15th day of December, 1958, at Garden City, Kansas.

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS.

NORTHERN NATURAL GAS COMPANY, a Corporation, Petitioner, vs. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Respondent, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, Intervenors.	Case No. 10470.

Journal Entry and Judgment.

Petition for judicial review filed herein by Northern Natural Gas Company came regularly on for argument herein on October 15, 1958, before the Honorable Roland H. Tate, Judge of the District Court of Finney County, Kansas. Petitioner, respondent, and the intervenors were present and represented by their counsel of record.

Petition for judicial review herein was timely filed herein with respect to general "Order and Report" of the State Corporation Commission effective February 1, 1958, and with respect to the "Interim Proration Orders and Re-

ports" finalized by the aforementioned general "Order and Report", such interim orders having been entered by said Commission for the months from and including May, 1956, to and ending with the month of November, 1957; that such "Order and Report" and such "Interim Orders" finalized therein set forth as a matter of policy how said State Corporation Commission expected to determine the market demand for Kansas Hugoton Field gas in any given proration period.

At the time of argument, petitioner Northern Natural Gas Company filed its brief. At the conclusion of the argument, the court granted time to the State Corporation Commission and to Intervenors to file responsive briefs, after which the Court allowed petitioner Northern Natural Gas Company time to file a reply brief. All such briefs have been filed within the time allotted, or as extended by the Court.

The court after having reviewed the files and pleadings and the transcript of proceedings filed herein, having heard the arguments of counsel for the respective parties and having studied the briefs submitted by the respective parties finds that the "Order and Report" of the State Corporation Commission effective February 1, 1958, is void and should be set aside.

The court further finds that the "Interim Proration Orders and Reports" of said Commission for the months beginning May, 1956, and ending November, 1957, are void and should be set aside insofar as the determination of market demand and allowables set forth therein are in excess of the market demand and allowables for such proration periods covered thereby, which market demand would have been determined and allowables would have been established under the method of determining market de-

mand, and calculating allowables, used by said Commission in said field prior to May, 1956.

It Is, Therefore, Ordered, and It Is the Judgment of the Court That the "Order and Report" of said Commission effective February 1, 1958. is hereby set aside.

It Is Further Ordered and It Is the Judgment of the Court That the "Interim Proration Orders and Reports" of said Commission for the months beginning May, 1956, and ending November, 1957, be and they are hereby set aside insofar as the determinations of market demand and allowables set forth therein are in excess of the market demand and allowables for such proration periods covered thereby which market demand would have been determined and allowables would have been established under the method of determining market demand and calculating allowables used by said Commission in said field prior to May, 1956.

Costs are taxed to the State Corporation Commission of the State of Kansas.

Dated this 15th day of December, 1958, at Garden City, Kansas.

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS.

COLORADO INTERSTATE GAS COMPANY, Petitioner, v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Respondent, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, Intervenors.	Case No. 10,573.

Journal Entry of Judgment.

Now on this 27th day of January, 1959, the petition for review filed by Colorado Interstate Gas Company comes on for hearing before the Honorable Roland H. Tate, Judge of the District Court of Finney County, Kansas, petitioner being represented by its counsel Ray H. Calihan, Stuart R. Carter and Malcolm Miller; respondent being represented by its counsel Clyde E. Milligan and J. Robert Wilson; intervenor Panhandle Eastern Pipe Line Company being represented by its counsel C. C. Linley and Chas. Vance; and intervenor Southwest Kansas Royalty Owners Association being represented by its counsel Dale M. Stucky.

Thereupon, counsel state and represent to the court, and the court finds, that it has heard petitions for review from the proration orders and reports issued by the State Corporation Commission pursuant to a hearing held on March 28, 1958, for the months of April through August under Docket Nos. 10,519, 10,520, 10,538, 10,544 and 10,553, and that the present petition for judicial review is from

the September proration order and report issued by the State Corporation Commission and is in similar form to the monthly orders for the five months preceding September, 1958, and on a common record with such five monthly orders.

Thereupon counsel for all of the respective parties stipulate and agree, with the consent of the court, that the transcript of proceedings, oral arguments and abstracts and briefs submitted and presented by the respective parties in the above numbered dockets, 10,519, 10,520, 10,538, 10,544 and 10,553, may be considered as addressed to the present petition for judicial review, the issues thereon being the same as the issues in said previous petitions for judicial review.

Thereupon the court, being fully advised in the premises, having reviewed the files and pleadings filed herein, having previously reviewed the transcript of the proceedings and having previously heard arguments of counsel and studied briefs of counsel, finds that the court permitted Panhandle Eastern Pipe Line Company and Southwest Kansas Royalty Owners Association to intervene in the proceedings for judicial review in the petition presently before the court. The court, upon application of Colorado Interstate Gas Company, entered a stay order staying execution of enforcement of the September proration order insofar as the allowables established in such order were in excess of the allowables which would have been established under the method of calculating allowables used by the State Corporation Commission in the Kansas Hugoton Field at all times prior to May 1, 1956. There is no contest in this proceeding concerning the allowances of intervention, the timeliness of the petition for review or the propriety of the stay order.

The court further finds that the monthly proration order and report for the month of September, 1958, is void and should be set aside, and that the allowables set forth in such order insofar as they are in excess of the allowables which would have been determined under the method of calculating allowables used by the State Corporation Commission prior to May, 1956, are void and should be set aside.

It Is, Therefore, Ordered, and It Is the Judgment of the Court, that the September, 1958, proration order issued by the State Corporation Commission must be and the same is hereby reversed and set aside and the allowables set forth therein are void insofar as they are in excess of the allowables which would have been established under the method of calculating allowables used by the State Corporation Commission prior to May of 1956.

And now later on this 27th day of January, 1958, Panhandle Eastern Pipe Line Company moves the Court for a new trial on the same grounds and for the same reasons as set forth in the motion for new trial filed in dockets numbered 10,519, 10,520, 10,538, 10,544 and 10,533, in the District Court of Finney County, Kansas; the State Corporation Commission of the State of Kansas moves the court for a new trial on the same grounds and for the same reasons as the motion for new trial filed by the State Corporation Commission in the above mentioned dockets; Southwest Kansas Royalty Owners Association moves the court for a new trial herein on the same grounds and for the same reasons assigned in the motion for new trial filed in the above mentioned dockets.

Thereupon, counsel for the respective parties stipulate and agree, with the court's consent, that the oral arguments previously made in support of their respective motions for new trial and the objections to the form of the judgment

and journal entry made on the motion of Panhandle Eastern Pipe Line Company to set aside the journal entry in the above numbered dockets be considered by the court in connection with the motions for new trial filed in this cause.

Thereupon the court considers the arguments of counsel, the files, briefs, and pleadings filed herein, and being otherwise fully advised in the premises, finds that the motions for new trial filed herein by Panhandle Eastern Pipe Line Company, The State Corporation Commission and Southwest Kansas Royalty Owners Association should be overruled and denied.

It Is, Therefore, by the Court Ordered, and It Is the Judgment of This Court, that the motions for new trial filed herein by Panhandle Eastern Pipe Line Company, The State Corporation Commission and Southwest Kansas Royalty Owners Association be, and the same hereby are overruled and denied.

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS.

NORTHERN NATURAL GAS COMPANY, Petitioner, vs. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Respondent.	Cases Numbered 10,589, 10,590, 10,600, 10,602, 10,611.

Journal Entry of Judgment.

Now on this 18th day of February, 1959, the same being a regular judicial day of this court, comes on for hearing the above captioned petitions for judicial review filed herein by Northern Natural Gas Company before the Honorable Roland H. Tate, Judge of the District Court

of Finney County, Kansas, petitioner and respondent being present and represented by their counsel of record. Panhandle Eastern Pipe Line Company having previously appeared specially for the sole purpose of objecting to the Court's jurisdiction in cases numbered 10,589, 10,590 and 10,600, was present and appeared specially by its counsel of record to object to the court's jurisdiction with regard to cases numbered 10,602 and 10,611.

Whereupon argument was had to the court on Panhandle Eastern Pipe Line Company's objections to jurisdiction. And the court having heard argument of counsel and being duly advised in the premises finds: That such objections should be and the same are hereby overruled.

Whereupon motions to dismiss cases numbered 10,602 and 10,611, by the State Corporation Commission of the State of Kansas come on for argument and the court having heard argument of counsel, having examined briefs submitted, and being duly advised in the premises finds that such motions to dismiss should be and the same are hereby overruled.

Thereupon Panhandle Eastern Pipe Line Company filed its Cross-Petition and its motion for separately stated findings of fact and conclusions of law in each case.

The motions for separately stated findings of fact and conclusions of law were argued by counsel and by the court overruled.

Whereupon the parties announce ready and the court proceeds to hear argument on such petitions for judicial review. The Court having reviewed the files and pleadings and the transcript of proceedings filed herein, having heard the arguments of counsel of the respective parties and having studied briefs submitted, finds that the

Commission market demand order of October 1, 1958, and its proration orders and reports for the months beginning October, 1958, and ending January, 1959, inclusive, are void and should be set aside insofar as the determination of market demand and allowables set forth therein are in excess of the market demand and allowables for such proration period covered thereby, if such market demand had been determined and allowables had been established under the method of determining market demand and calculating allowables, used by said commission in said Hugoton Field prior to May, 1956.

It Is, Therefore, Ordered and It Is the Judgment of the Court that the market demand order of October, 1958, and the proration orders for the months beginning October, 1958, and ending January, 1959, both inclusive, of the State Corporation Commission be and they are hereby set aside insofar as the determinations of market demand and allowables set forth therein are in excess of the market demand and allowables for such proration period and months covered thereby determined and calculated in the historic manner followed by the Commission prior to May, 1956.

Thereupon, Panhandle Eastern Pipe Line Company, appearing by its counsel of record, objected to the form of court's judgment which objection was overruled and it is so ordered.

Thereupon, the State Corporation Commission of the State of Kansas and Panhandle Eastern Pipe Line Company appearing by their respective counsel of record move the court for a new trial and the court after listening to the arguments and statements of counsel and being duly advised in the premises finds that the said motions should be and the same are hereby overruled. It Is So Ordered.

.....

Judge.

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS.

COLORADO INTERSTATE GAS COMPANY, Petitioner, vs. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Respondent.	Cases Nos. 10,581, 10,582, 10,591, 10,595, 10,607.

Journal Entry.

The petitions for review in the cases captioned above as filed by Colorado Interstate Gas Company came on for hearing this 18th day of February, 1959, before The Honorable Roland H. Tate at Garden City, Kansas; Colorado Interstate Gas Company being represented by its counsel, Ray M. Calihan, Daniel R. Hopkins, Stuart R. Carter and Malcolm Miller; the State Corporation Commission being represented by its General Counsel, Clyde E. Milligan, Panhandle Eastern Pipe Line Company appearing generally in cases 10,581, 10,582, and 10,591 and specially for the purpose of objecting to the jurisdiction in cases 10,595 and 10,607, by its counsel, C. C. Linley and Charles E. Vance; Southwest Kansas Royalty Owners Association being represented by its counsel, Dale M. Stucky and Robert T. Cornwell.

Thereupon, the State Corporation Commission filed a motion to dismiss the petitions for review docketed as Nos. 10,595 and 10,607 on the ground and for the reason that the Court lacked jurisdiction to consider the issues therein involved; Panhandle Eastern Pipe Line Company filed its objection to the jurisdiction of the Court in cases 10,595 and 10,607 on the ground and for the reason that the Court lacked jurisdiction to consider the issues therein involved.

and Southwest Kansas Royalty Owners Association appeared specially and moved the Court to dismiss the same two petitions for judicial review for the reason that the Court lacked jurisdiction over the subject matter.

The Court, after hearing argument of counsel and being duly advised in the premises, finds that such motions to dismiss and objection to the jurisdiction should be overruled.

It Is Therefore Ordered that the motions to dismiss filed by the State Corporation Commission and Southwest Kansas Royalty Owners Association and the objection to the jurisdiction filed by Panhandle Eastern Pipe Line Company in Cases Nos. 10,595 and 10,607 should be, and the same are hereby, overruled.

Thereupon, Panhandle Eastern Pipe Line Company filed a motion in each of the cases captioned above requesting the Court to make findings of fact and conclusions of law.

After argument of counsel, the Court, being duly advised in the premises, finds that such motion should be overruled.

It Is Therefore Ordered that the motions of Panhandle Eastern Pipe Line Company requesting the Court to make findings of fact and conclusions of law in each of the above captioned cases should be, and the same are hereby, overruled.

Thereupon, Panhandle Eastern Pipe Line Company filed a cross-petition in each of the cases captioned above and attached to such cross-petitions, or was granted the permission to attach to such cross-petitions, the petitions for judicial review filed by Panhandle Eastern Pipe Line Company in the District Court of Stevens County, Kansas, from

the identical orders of the Commission which formed the subject matter of the petitions for review filed by Colorado Interstate Gas Company.

Thereupon, the petitions for judicial review were argued by the parties and briefs were submitted by the parties.

Thereupon, Panhandle Eastern Pipe Line Company moved that all the pending petitions for review in the District Court of Finney County, Kansas, be consolidated for all purposes. After hearing argument of counsel and being duly advised in the premises, the Court finds that such motion should be overruled.

It Is Therefore Ordered that the motion of Panhandle Eastern Pipe Line Company to consolidate the petitions for review should be, and the same is hereby, denied and overruled.

After hearing the arguments and considering the briefs in each of the petitions for review as captioned above, the Court, after reviewing the files, the pleadings, including the transcript of the proceedings filed herein, finds that the six months order of the Commision, Docket No. 10,582, is void and should be reversed and set aside and that the monthly proration orders for the months of October, November, and December of 1958, and January of 1959, with docket numbers, respectively, 10,581, 10,591, 10,595 and 10,607 are void and must be reversed and set aside and the allowables set forth therein are void insofar as they are in excess of the allowables which would have been determined under the method of calculating allowables used by the State Corporation Commission prior to May of 1956.

It Is Therefore Ordered and It Is the Judgment of the Court that the report and order of the State Corporation

Commission for the proration period October 1, 1958, through March 31, 1959, Docket 10,582, must be, and the same is hereby, reversed and set aside.

It Is the Further Order of the Court and the Court's judgment that the gas proration order and report for October, 1958, November, 1958, December, 1958, and January, 1959, Dockets Nos. 10,581, 10,591, 10,595 and 10,607, respectively, must be and the same are hereby, reversed and set aside and the allowables set forth therein are void insofar as they are in excess of the allowables which would have been established under the method of calculating allowables used by the State Corporation Commission prior to May of 1956.

Thereupon, the State Corporation Commission filed its motior for a new trial and Panhandle Eastern Pipe Line Company filed its motion for a new trial in all the dockets as captioned above. After hearing argument of counsel for the respective parties and being fully advised in the taken jurisdiction of the identical matters at issues in the above cases, as well as former companion matters, I can see no good that could result from any judgment by this court until a final disposition has been made of the identical matters in the District Court of Finney County, Kansas.

If this court makes the same findings and renders the same judgment, as those made and to be made by the District Court of Finney County, Kansas, then nothing beneficial is accomplished.

Findings and judgments by this court different or contrary to those made by the District Court of Finney County, Kansas, would result in two appeals to the Supreme Court on the same points.

Such results would not be beneficial to the litigating parties and would be harmful to the prestige and dignity of the judiciary of Kansas.

Therefore, this court, on its own motion, continues the above cases for decision until disposition has been made of the identical matters in the District Court of Finney County, Kansas, or until something further arises that is premises, the Court finds that the motions for a new trial should be overruled.

It Is Therefore Ordered and It Is the Judgment of this Court that the motions for a new trial filed in each of these dockets by the State Corporation Commission and by Panhandle Eastern Pipe Line Company should be, and the same are hereby, overruled and denied.

Roland H. Tate,
District Judge.

APPENDIX C

(2)

Comments Re: Judgments of the District Court of Finney County, Kansas, by the District Court of Stevens County, Kansas, in the First Set of Appeals

IN THE DISTRICT COURT OF STEVENS COUNTY, KANSAS

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY,

Petitioners,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,

Respondent,

NORTHERN NATURAL GAS COMPANY,

Intervenor.

Cases Numbered: 4044, 4045, 4046 4047; 4048, and 4049.

Mr. Dale M. Stucky
901 First National Bank Bldg.
Wichita 2, Kansas

Mr. A. E. Kramer
Hugoton, Kansas

Mr. C. C. Linley
Liberal, Kansas

Mr. Chas. Vance
Liberal, Kansas

Mr. Clyde E. Mil' gan
Kansas Corporation Commission
Topeka, Kansas

Mr. Mark H. Adams
202 Board of Trade Bldg.
Wichita, Kansas.

Order of Continuance.

The above cases are before this court on:

1. Motion by Intervenor to dismiss for lack of jurisdiction; and

2. Judicial Review of Orders made by The State Corporation Commission of the State of Kansas.

Since the District Court of Finney County, Kansas, has not ... this time foreseen by this court.

s/ L. L. Morgan

Judge L. L. Morgan
District Judge

APPENDIX C

(3)

Judgments of the District Court of Finney County, Kansas, in the Second Set of Appeals

JOURNAL ENTRY AND JUDGMENT.

The above captioned matter, consisting of consolidated cases filed by Colorado Interstate Gas Company, Nos. 10,744, 10,745, 10,755, 10,773, 10,783, 10,796 and 10,805; Northern Natural Gas Company, Nos. 10,746, 10,747, 10,754, 10,774, 10,784, 10,795 and 10,806; Cities Service Gas Company, Nos. 10,748, 10,749, 10,757, 10,790, 10,794, 10,801 and 10,813; and Kansas-Nebraska Natural Gas Company Nos. 10,765, 10,766, 10,767, 10,787, 10,80[illegible], 10,804 and 10,814; came

on for hearing before The Honorable Roland H. Tate, Judge of the District Court of Finney County, Kansas, on the petitions for judicial review filed by the respective parties as hereinbefore indicated, on the 24th day of February, 1960.

Colorado Interstate Gas Company appears by Malcolm Miller and Stuart R. Carter, of Wichita, Kansas, and Daniel R. Hopkins and Ray H. Calihan, of Garden City, Kansas. Northern Natural Gas Company appears by Mark H. Adams and Mark H. Adams, II, of Wichita, Kansas, and Daniel R. Hopkins and Ray H. Calihan of Garden City, Kansas, and Jack C. Osborne of Omaha, Nebraska. The State Corporation Commission appears by J. Robert Wilson, General Counsel, and S. F. Flesker and John Townsend, Assistant General Counsel. Panhandle Eastern Pipe Line Company appears specially for the purpose of objecting to the jurisdiction of the Court by Charles Vance and C. C. Linley of Liberal, Kansas, and the Southwest Kansas Royalty Owners Association appears specially for the purpose of objecting to the jurisdiction of the Court by Dale M. Stucky, Hugo T. Wendell and Robert T. Cornwell, of Wichita, Kansas. Kansas-Nebraska Natural Gas Company appears by Douglas Gleason of Ottawa, Kansas, and James D. Conway and Elmer J. Jackson, of Hastings, Nebraska. Cities Service Gas Company appears by Joe Rolston, Oklahoma City, Oklahoma, and Lang & Wallace of Scott City, Kansas.

Thereafter it is stipulated that all of the cases hereinbefore mentioned may be heard at this time on a common record and consolidated under No. 10,744 in this court.

Colorado Interstate Gas Company objects to the special appearances of Panhandle Eastern Pipe Line Company and Southwest Kansas Royalty Owners Association, and Northern Natural Gas Company joined in the objection.

and such objections were taken under advisement by the Court.

Thereafter Panhandle Eastern Pipe Line Company offered evidence in support of its objection to the jurisdiction, and the objection to jurisdiction of Panhandle Eastern Pipe Line Company and the motion of the Southwest Kansas Royalty Owners Association to dismiss were overruled by the Cou t.

Thereafter the State Corporation Commission presented a motion for change of venue and a motion to dismiss, which were overruled by the Court.

Thereafter the motion of Panhandle Eastern Pipe Line Company for a stay was overruled by the Court.

Thereafter the motion of Panhandle Eastern Pipe Line Company for special findings of fact and conclusions of law was argued and overruled by the Court.

Thereafter the Court overruled Southwest Kansas Royalty Owners Association's motion for a stay pending hearing of its appeal from the Court's order overruling its motion to dismiss.

Thereafter the Court ruled that the only parties to the action were those named in the caption of the various actions consolidated herein and that Panhandle Eastern Pipe Line Company and the Southwest Kansas Royalty Owners Association were not parties to the action. The Southwest Kansas Royalty Owners Association and Panhandle Eastern Pipe Line Company did not thereafter participate in trial of the actions.

Thereupon, the Court heard the arguments presented by counsel to Colorado Interstate Gas Company, Northern Natural Gas Company and the State Corporation Commission and received at such times and thereafter, at times set

by the Court, briefs and reply briefs, submitted by the respective parties.

Thereafter, and on the 26th day of May, 1960, the Court, being duly advised in the premises, and after considering the briefs, arguments and record filed herein,

Adjudges, Decrees and Determines:

That the report and order of the State Corporation Commission dated November 10, 1959, for the six months' proration period beginning October 1, 1959, and running through March 31, 1960, for the Kansas Hugoton Gas Field, is a proper, lawful and valid order and such order should be, and the same is hereby, affirmed.

The Court Further Decrees, Adjudges and Orders that the several monthly proration orders entered by the State Corporation Commission for October, 1959, monthly, through March, 1960, should be, and the same are hereby, reversed and set aside insofar as the net allowables there set forth are greater by virtue of underages, either canceled or carried forward as a result of the Commission's departing from its former method of determining allowables beginning May, 1956, to October 1, 1959; and such monthly proration orders entered by the State Corporation Commission for the months of October, 1959, through March, 1960, are affirmed insofar as such orders discloses market demand and current allowables without adjustment to runs as determined by the Commission and net allowable determined by adding underage or subtracting overage from current allowable, so long as such underage or overage accrued since October 1, 1959; such reversal being in accordance with the previous judgments of this court and particularly the judgment entered December 15, 1958, but not to extend such judgment past the Commission's determination under the amendment to the Gas

Conservation Statute (G.S., 1959 Supp., 55-703) and the proceedings thereunder begun by the Commission effective October 1, 1959.

Thereafter and on the 26th day of May, 1960, the motions for a new trial filed by Colorado Interstate Gas Company, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Kansas-Nebraska Natural Gas Company, Cities Service Gas Company and the State Corporation Commission came on for hearing, and the Court, being duly advised in the premises and after considering the arguments of counsel, denies all such motions for a new trial.

Thereafter and on the oral motions of the parties to this litigation the Court finds that its judgment should be stayed pending appeals which various parties announce they contemplate and will promptly file.

The Court further decrees, adjudges and orders that the costs herein be taxed equally to Colorado Interstate Gas Company, Northern Natural Gas Company, Cities Service Gas Company, Kansas-Nebraska Natural Gas Company and the State Corporation Commission of the State of Kansas.

APPENDIX C

(4)

Judgments of the District Court of Stevens County, Kansas, in the Second Set of Appeals

ORDER OF CONSOLIDATION.

On February 13, 1960, the District Court of Stevens County, Kansas, consolidated Cases numbered 4104, 4105, 4109 and 4117. A true copy of such Order is as follows:

DISTRICT COURT OF STEVENS COUNTY, KANSAS.

Southwest Kansas Royalty Owners' Association, Petitioner, vs. State Corporation Commission of Kansas, Respondent.	Case No. 4104 4105 4110 4117

ORDER OF CONSOLIDATION.

Now on this 13th day of February, 1960, this action comes on for trial on the merits pursuant to setting of this case made on the call of the docket on the first day of the January term. Southwest Kansas Royalty Owners' Assn. appears by its attorneys, Dale M. Stucky, Robert Cornwell and A. E. Kramer; the Kansas Corporation Commission appears by J. Robert Wilson and John Townsend, its attorneys, and Panhandle Eastern Pipe Line Co. appears by C. C. Linley and Chas. Vance, its attorneys.

Upon oral motion of Panhandle Eastern Pipe Line Company made in open court, and upon argument of counsel, the court finds that cases 4104, 4109 and 4117,

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and all of the cases heretofore consolidated with them, should be consolidated with Case No. 4105, the market demand case, for the purpose of trial, judgment and further proceedings.

It is by the Court so ordered.

L. L. Morgan,
District Judge.

Approved:

C. C. Linley,
Chas. Vance,
By: C. C. Linley,
Attorneys for Panhandle Eastern Pipe Line Company.

J. Robert Wilson
John Townsend,
By: John D. Townsend,
Attorneys for Kansas Corporation Commission.

Dale M. Stucky,
Robert Cornwell,
A. E. Kramer,
By: Dale M. Stucky,
Attorneys for Southwest Kansas Royalty Owners' Association.

Filed: 2-24-60. John F. Fulkerson, Clerk of the Dist. Court.

TRIAL COURT'S JUDGMENT.

Thereafter on March 10, 1960, the District Court of Stevens County, Kansas, in consolidated case number 4105 entered judgment as per Journal Entry which is as follows:

IN THE DISTRICT COURT OF STEVENS COUNTY, KANSAS.

SOUTHWEST KANSAS ROYALTY OWNERS' ASSOCIATION, Petitioner, vs. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Respondent.	Case No. 4105

JOURNAL ENTRY

Now on this 13th day of February, a regular judicial day of the January, 1960 term, this action and the actions consolidated with it by order of the court, came on for trial pursuant to a setting made by the court on the first day of the term.

Petitioner appears by Dale M. Stucky, Robert Cornwell and A. E. Kramer, its attorneys; the Kansas Corporation Commission appears by J. Robert Wilson and John Townsend, its attorneys and Panhandle Eastern Pipe Line Company appears by C. C. Linley and Chas. Vance, its attorneys. All parties announce ready for trial; there are no other appearances.

The Court, having stated that Northern Natural Gas Company, Inc., Cities Service Gas Company and Colorado Interstate Gas Company did not appear on the first day of the term when the case was set for hearing, inquires whether any of said companies lacked actual notice of the order of this Court entered on February 6, 1960.

There is offered in evidence and ordered filed in the case the affidavit of Chas. Vance showing that certified copies of said Court order was mailed by certified mail to all parties and their attorneys on February 6, 1960;

that the attached return receipts show delivery to all concerned on February 8, 1960. Thereupon counsel state to the Court that all parties and their attorneys had actual notice of this setting for trial on the merits by mail and otherwise. The court examines the files and finds that, although pleadings filed since the first day of the term appear to have been noticed for the first day of the March term, no application for a continuance has been made by any of the parties.

Thereupon the Court waits for one hour. There are no further appearances. The Court proceeds to hear the case upon argument of counsel and the transcript. At the conclusion thereof, it takes the same under advisement.

Thereafter, and on March 10, 1960, the Court, after being fully advised in the premises finds:

1. That, upon the Court's own motion, the orders made February 6, 1960, should be and the same are hereby set aside insofar as said orders affect and consolidate the cases pending in the Finney County District Court.

2. That the Report and Order dated November 10, 1959, and subsequent allowable orders of the State Corporation Commission are based on substantial competent evidence and are lawful and valid. Said report and order makes reasonable provisions for an orderly process correcting inequities (existing for more than ten years and which have progressively increased) discriminating in favor of the correlative rights of producers and royalty owners in the Oklahoma Hugoton Gas Field and against those in the Kansas Hugoton Gas Field; as provided by the Statutes of Kansas, Section 55-703, 1959 supplement.

It Is Therefore Ordered, Adjudged and Decreed that the Report and Order dated November 10, 1959, and sub-

sequent allowable orders of the State Corporation Commission be and they are hereby affirmed.

/s/ L. L. Morgan,
Judge, District Court.

IN THE DISTRICT COURT OF STEVENS COUNTY, KANSAS.

Southwest Kansas Royalty Owners Association et al., Petitioners, vs. The State Corporation Commission of the State of Kansas et al., Respondents.	No. 4105

JOURNAL ENTRY.

Now on this 12th day of May, 1960, this matter comes on for hearing pursuant to notice to all parties on the Southwest Kansas Royalty Owners Association's motion to settle and determine the form of a Journal Entry reflecting the rulings and decisions made by this court on March 19, 1960, the Southwest Kansas Royalty Owners Association appears by and through its attorney, Robert T. Cornwell; the State Corporation Commission appears by and through its attorney, John T. Townsend; and Panhandle Eastern Pipe Line Company appears by and through its attorneys, C. C. Linley and Charles Vance. The court, after reviewing the file and being well advised, finds and determines that the following Journal Entry should be and hereby is entered as the court's journal entry covering the hearing held herein on March 19, 1960:

JOURNAL ENTRY.

Now on this 19th day of March, 1960, this matter comes on for hearing on the motions filed by Northern Natural

Gas Company, Panhandle Eastern Pipe Line Company and the Southwest Kansas Royalty Owners Association. The State Corporation Commission appears by and through its general counsel J. Robert Wilson; Panhandle Eastern Pipe Line Company appears by and through its attorneys, C. C. Linley and Charles Vance; the Southwest Kansas Royalty Owners Association appears by its attorneys Dale M. Stuck and Robert C. Cornwell; and Mark Adams, Mark Adams II, Floyd Jensen and Daniel Hopkins announce to the court that they appear specially for Northern Natural Gas Company to present its motions filed on February 13, 1960, and March 14, 1960.

Thereupon Northern Natural Gas Company presents its motion, filed on March 14, 1960, to vacate the court's judgment entered herein on March 10, 1960, and the court, after hearing argument of counsel, finds that such motion should be overruled.

It Is So Ordered.

Thereupon Northern Natural Gas Company presents its motion, filed on March 14, 1960, to vacate the court's judgment entered herein on March 10, 1960, and to allow Northern Natural Gas Company to participate in the presentation of said judicial proceedings on the merits, and the court, after hearing argument of counsel, finds that such motion should be overruled.

It Is So Ordered.

Thereupon Northern Natural Gas Company presents its motion, filed on February 13, 1960, to quash, and the court, after hearing argument of counsel, finds that such motion should be overruled.

It Is So Ordered.

Thereupon Northern Natural Gas Company presents its motion, filed on December 26, 1959, to dismiss, and the court, after hearing argument of counsel, finds that such motion is not properly before this court for determination at this time, and the court finds, in the alternative, that if such motion is properly before this court for determination at this time, such motion should be overruled.

It Is So Ordered.

Thereupon Northern Natural Gas Company, Panhandle Eastern Pipe Line Company and the Southwest Kansas Royalty Owners Association present their motions for a new trial, and the court, after hearing argument of counsel, finds that such motions should be overruled.

It Is So Ordered.

Judge Morgan.

APPENDIX D

November, 1957, Interim Allowable Order.

On December 18, 1957, the Commission issued an "Interim Order" in Docket 55,705-C (C-3792) which contained the following recitals:

> "1. That after notice as provided by the statutes and rules and regulations, the above-entitled matter was heard by the Commission at Wichita, Kansas, on September 27, 1957, evidence thereon taken and all parties afforded an opportunity to be heard.
>
> **2. That an interim order should be entered herein determining a schedule of production allowable to wells in the Hugoton Gas Field for the month of November, 1957, but determinative of no other issue in Docket No. 51-488-C (C-4916) now pending before the Commission.**

3. That at the hearing referred to in Finding (1), nominations filed with the Conservation Division by purchasers of the gas produced in the Hugoton Field for the month of November, 1957, amount to 42,307,000 M.c.f., subsequently amended to 41,907,000 M.c.f.; that the reasonable market demand for gas produced from said field in Kansas during said month is determined to be 41,907,000 M.c.f. * * *

4. That in order to protect the respective correlative rights of the producers and other interested parties having a right to withdraw gas from the common reservoir and in order to permit the wells and leases therein to currently produce proportionately so that each may ultimately produce approximately the amount of gas underlying it, production quotas for the several developed leases and wells should be established during said period in accordance with the Basic Order No. 44-3-21 entered in Docket No. C-164, as amended.

5. That the acreage attributable to and the individual well deliverability factors of the several wells in said field are in the amounts and figures as set out in the November, 1957, allowable report which is attached hereto marked Exhibit 'A' and hereby referred to and made a part hereof by reference; that the allocation of the allowed production within and between the wells in said common source of supply and the individual well production quotas should be made and established in the manner and form prescribed in said Basic Order No. 44-3-21, entered in Docket No. C-164, as amended; and when so made and established are in the amounts and figures as set out in said schedule Exhibit 'A'.

6. That such allowable should constitute the maximum permissible production from such wells and leases for the period covered by this order.

It Is, Therefore, by the Commission Ordered: That the market demand for natural gas from the Hugoton Gas Field located in Kearny, Finney, Grant,

Haskell, Morton, Stevens, Seward, Stanton and Hamilton Counties, Kansas, for the month of November, 1957 is hereby determined to be 41,907,000 M.c.f. * * *"

Under a paragraph entitled "Explanation" in the November, 1957, Interim Order, the Commission set forth how the November current allowable was computed.

"October net allowable	83,162,174 M.c.f.
October runs	30,746,865 M.c.f.
Underage	52,415,309 M.c.f.
November nominations	41,907,000 M.c.f.
Plus November cancelled underage	12,267 M.c.f.
November current allowable	41,919,267 M.c.f.
Plus net underage	52,403,042 M.c.f.
November net allowable	94,322,309 M.c.f.

Total adjusted deliverability is 5,021,065.
Deliverability standard pressure is 270.2 pounds."

Also under the heading of "Explanation" in said Interim Order, appears the following:

"The allowables shown on Exhibit 'A' are computed in accordance with Order No. 44-3-21, the Basic Order for the Hugoton Field. The November current allowable for each well is determined by multiplying the product of its deliverability and acreage factor by $8.34868040 \cdot \frac{(41,919,267)}{(5,021,065)}$ the relationship of the total current allowable to the total deliverability adjusted for acreage."

On January 24, 1958, Colorado Interstate filed its petition for rehearing on the above order, which petition was overruled on January 29, 1958.

On January 30, 1958, the Commission mailed its General Order in show cause docket No. 51,488-C (C-4916), which had been consolidated for the purpose of the record with various market demand dockets. The General Order recites that it is to become effective February 1, 1958.

APPENDIX E

BEFORE THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS.

In the matter of determining the market demand for natural gas for the Hugoton Gas Field of Kearny, Finney, Grant, Haskell, Morton, Stevens, Seward, Stanton and Hamilton Counties, Kansas, the deliverability and acreage attributable to each of the respective wells therein, and fixing gas production percentages and quotas for wells within said field for the proration period extending from April 1, to September 30, 1956, both inclusive.	Docket No. 51,342-C (C-4888) Conservation Division,
In the matter of determining the market demand for natural gas for the Hugoton Gas Field of Kearny, Finney, Grant, Haskell, Morton, Stevens, Seward, Stanton and Hamilton Counties, Kansas, the deliverability and acreage attributable to each of the respective wells therein, and fixing gas production percentages and quotas for wells within said field for the proration period extending from October 1, 1956, to March 31, 1957, both inclusive.	Docket No. 53,042-C (C-5171) Conservation Division.
In the matter of determining the market demand for natural gas for the Hugoton Gas Field of Kearny, Finney, Grant, Haskell, Morton, Stevens, Seward, Stanton and Hamilton Counties, Kansas, the deliverability and acreage attributable to each of the respective wells therein, and fixing gas production percentages and quotas for wells within said field for the proration period extending from April 1, to September 30, 1957, both inclusive.	Docket No. 54,220-C (C-5454) Conservation Division
In the matter of Cities Service Gas Company, Colorado Interstate Gas Company, Hugoton Production Company, Kansas-Colorado Utilities, Inc., Kansas-Nebraska Natural Gas Company, Inc., Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Quinque Oil and Gas Production Company, United Carbon Company, Shallow Water Refining Company, to show cause.	Docket No. 51,488-C (C-4916) Conservation Division

REPORT AND ORDER OF THE COMMISSION.

By the Commission:

1. This proceeding was initiated by the Commission by an order issued March 16, 1956, directed to purchasers of natural gas produced in the Kansas Hugoton Gas Field to show cause why they should not be required to take ratably from the various wells in the Hugoton Gas Field in the State of Kansas in order to prevent discrimination, uncompensated cognizable drainage, inequitable taking and waste as contemplated by the gas conservation statutes of the State.

2. A public hearing was duly held on March 30, 1956, at the Allis Hotel, Wichita, Kansas, at which appearances were entered on behalf of Cities Service Gas Company, Northern Natural Gas Company, Shallow Water Refining Company, Colorado Interstate Gas Company, Kansas-Nebraska Natural Gas Company, Inc., Panhandle Eastern Pipe Line Company, Kansas-Colorado Utilities, Inc., Hugoton Production Company, Quinque Oil and Gas Production Company, United Carbon Company, Inc. (Maryland), United Carbon Company, Southwest Kansas Royalty Owners Association, intervenor, and the Commission. That at said hearing, this docket was consolidated for hearing purposes with Docket No. 51,342-C (C-4888) the market demand hearing for the Hugoton Gas Field for the proration period from April 1, to September 30, 1956; subsequently those dockets were consolidated for hearing purposes with subsequent market demand hearing dockets Nos. 53,042-C (C-5171), 54,220-C (C-5454) and 55,705-C (C-5792), all being heard on a common record. Further hearings were held on April 27, May 24, June 28, July 20, and August 30, 1956, April 23 and August 27 and 28, 1957, at which evidence and arguments were presented, at the

close of which the matter was taken under advisement by the Commission.

3. Extensive public hearings have been held in these dockets. The transcript of proceedings and exhibits is voluminous. Pertinent facts established by the history of the field, Commission records and the transcript of proceedings herein will be briefly stated.

4. The question presented for determination in these proceedings is two-fold; whether migration of gas may be occurring or is likely to occur from the Kansas portion of the Hugoton Gas Field to other portions of the field; remedial steps which may be and should be taken by the Commission to prevent loss of this valuable natural resource to Kansas and Kansas owners, and what corrective measures may be and should be taken by the Commission in performance of its statutory duty to prevent waste, protect correlative rights, and prevent unreasonable discrimination and inequitable withdrawals of gas from said field.

Evidence and Findings of Fact.

5. The Hugoton Gas Field of Kansas, located in nine southwestern counties of the state, is a part of a large natural gas reservoir which extends south across the Oklahoma Panhandle and into Texas. The largest portion of the field is in Kansas. Gas is found in porous limestone and dolomite in the Hugoton Gas Field. The thickness of the gas producing horizons varies considerably and they are not uniform as to porosity or permeability.

6. Early development in Kansas, prior to proration, was in an area approximately 20 miles north of the Kansas-Oklahoma state line and in Oklahoma in an area from 10 to 25 miles south of said state line. As a result of this early development, areas of reduced pressures or "pressure

sinks" were created surrounding the early wells. Later the areas of early development were connected by production so that by 1956 there were relatively few remaining undrilled well locations.

7. The movement of gas within a common reservoir is governed by pressure differentials; the gas migrates from the areas of higher pressure to the areas of lower pressure. In its virgin state, the pressure within a common source of supply is the same, or practically the same, at all points. When gas is produced from a well, the pressure within the reservoir is reduced in the vicinity of the well bore. This causes gas in the formation to expand into the well. When a producing well is shut in, the pressure in the formation in the vicinity of the well will build up from that existing during production and this again tends to equalize the pressure within the formation and demonstrates that the continued migration of gas from high pressure to low pressure areas is occurring. Gas migrates within the reservoir from developed leases having higher pressures to other developed leases having lower pressures in accordance with the same principles which govern the movement of gas from the formation into the several well bores. If the migration or drainage of gas across property lines is not equalized by counter-drainage, the developed leases so drained will not ultimately produce approximately the amount of gas underlying them. The extent of the movement of gas between developed leases depends upon the magnitude of variation in pressures existing as between developed leases, the areas contained in such leases and the amounts of gas withdrawn. (Hugoton Proration Order, paragraph d).

Pressure History.

8. The virgin shut-in wellhead pressure of the entire Hugoton reservoir was approximately 435 p.s.i.g. a study

of the closed-in wellhead pressures by years reveals that by 1948 the arithmetic average closed-in wellhead pressure in the Kansas portion of the field was 385 pounds, while the corresponding figure for the Oklahoma portion of the field was 384 pounds, and the average pressure in the Texas portion of the field was 378 pounds. Until 1948, the pressure decline in the three states was about equal. But by 1954 the average wellhead pressure of Kansas wells was 366 pounds, a decrease of 19 pounds from 1948. At the same time the average Oklahoma wellhead pressure had declined to 340 pounds, a decrease of 44 pounds over the same period of time, while the Texas pressure had been reduced to 339 pounds, a decrease of 39 pounds. By 1956 the average wellhead pressure in Texas had decreased to 288 pounds, in Oklahoma to 316 pounds, while the Kansas average pressure was still as high as 356 pounds.

9. Pressure declines result from production of gas reserves and are also a measure of the rate of depletion of gas reserves. The gas reserves in the Oklahoma portion of the reservoir are being depleted approximately twice as fast as the gas reserves in the Kansas portion of the reservoir and the gas reserves in the Texas portion of the reservoir are being depleted at an even higher rate. Evidence further indicates that if the present trend continues, the arithmetic average closed-in wellhead pressure p.s.i.g. for wells one mile each side of the Oklahoma-Kansas state line will be as follows:

	Kansas	Oklahoma
1958	322	315
1959	317	306
1960	312	298
1961	307	290
1962	301	282

10. Evidence presented at the hearings on these dockets indicates that at the present time pressure differentials do exist between developed leases in the southern portion of the Kansas Hugoton Field and leases in the northern portion of the Oklahoma Field. While the actual amount of drainage from the Kansas portion of the field to the Oklahoma portion of the field is not at this time cognizable, the evidence shows that this drainage will become cognizable within a period of three or four years unless the takes of gas from the Kansas portion of the field are increased in sufficient amounts to stop the increasing difference between the pressures in the Kansas field and the Oklahoma field.

Interim Order.

11. During the course of the hearings herein, the Commission has issued its monthly proration orders and reports for the Hugoton Gas Field, denominated Interim Orders. Each of these orders issued for the month of April, 1956, and subsequent months through November, 1957, has contained the following finding:

> "That an interim order should be entered herein determining a schedule of production allowable for wells in the Hugoton Gas Field for the month of (current month), but determinative of no other issue in the matter referred to above, now pending before the Commission."

12. In view of this clear and unequivocal language contained in the orders themselves, we interpret these orders to be final orders so far as they determined allowables for each month. As stated in the orders, they determined the monthly allowables, but were determinative of *no other* issue pending in the dockets. No one of the Interim Orders issued by the Commission from April, 1956, through October, 1957, has been contested.

Market Demand Factors to Be Considered.

13. This Commission, as an arm of the State, has the power, in the interest of conservation, to enter such orders as may be necessary to prevent waste of natural resources and to protect correlative rights. The statute is clear that the Commission shall so regulate the taking of gas from any and all common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation, and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. The legislature said specifically that the Commission in promulgating rules, regulations and formulas to attain such results should take into consideration certain conditions and then added "and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time as may be pertinent." (G. S. 1949, 55-703).

14. From the evidence presented, it is apparent to the Commission that a determination of market demand based only on nominations reduces the allowables to a point where Kansas cannot produce the gas that could otherwise be produced in compliance with the basic order. It is necessary, therefore, that the Commission evolve a method of determining market demand and calculating allowables which will give effect to all the actual facts and conditions existing in the field rather than use solely the pipe line purchasers' nominations as the market demand.

15. In order for the Commission to properly administer and regulate the production of natural gas as required by statute the Commission must periodically determine the market demand for gas from the field. In addition to the general statutory duty imposed in this regard,

the Hugoton Proration Order, in paragraph "o" thereof, made the following finding:

> "o. At such time and place as the Commission shall fix, the Commission will, after notice, conduct a hearing to determine the market demand for natural gas from said field for the next six succeeding proration periods, or for such other period of time as the Commission shall prescribe, and at said hearing may determine any other questions which may properly and legally come before the Commission for consideration thereat, and a new schedule of production allowable for the wells in said field, based upon the determination made as a result of such hearing, shall be prepared and promulgated for the ensuing proration periods."

16. A review of the Commission's past allowable orders and the evidence presented in these dockets discloses that heretofore the nominations by the purchasers from the Hugoton Field have been used and considered by the Commission as the market demand for the field. However, the evidence presented in these dockets discloses that in many instances the aforesaid nominations did not approximate the market demand. Therefore the Commission finds that it is necessary, in determining the market demand for natural gas from the Hugoton Field, to consider, in addition to the nominations by the purchasers, the following factors:

(1) Takes from other sources of supply to which the purchasers are connected.

(2) The total markets for natural gas of all purchasers from the Kansas Hugoton Field; the rate of increase therein compared to the rate of increase in the takes from the Kansas portion of the Hugoton Field.

(3) Takes from other sources of supply in Kansas:

(4) Any other factors, conditions and or circumstances that would aid the Commission in establishing the market demand.

Calculation of Allowables.

17. The market demand figure, once obtained, heretofore was used to determine the current allowable to be assigned by the Commission to the field. Prior to May, 1956, the current allowable was determined by taking the market demand, first adding thereto the cancelled underages for the previous month and then subtracting therefrom the amount of underproduction or adding thereto the amount of overproduction for the previous month. The result of the use of this method was that in actuality the runs or takes from the field controlled the amount of the current allowable; the control of the market demand and current allowable was entirely and exclusively in the hands of the purchaser pipeline companies, and not in the Commission.

18. The Commission, in an effort to take control, deviated from this formula of determining current allowables and for August, 1956, and subsequent months has fixed current allowables by taking he market demand figures, still based exclusively on nominations of the purchasers, and adding thereto the cancelled underproduction for the previous month. Actually, except for the consideration of a small amount of cancelled underproduction, the market demand, based solely on the nominations of the purchasers, was the current allowable for the field. The current allowable for each well was calculated in accordance with the provisions of paragraph (1) of the Basic Order for the Hugoton Gas Field. Each well continued to carry in addition to its current allowable such underproduction or overproduction as may have accrued to it. The result was the net allowable for each well. The sum total

of the net allowables of the wells therein represented the net allowable for the entire field.

19. To restate this formula, allowables in the future will be determined as follows: Consider the factors as discussed in paragraph 16 above and arrive at the market demand figure; add to it the cancelled underages, and the result will be the current monthly allowable. (This is the amount that is ratably apportioned to the wells each month.) To ascertain the net allowable for the field as a whole, add the total net underage or subtract the total net overage. The resulting figure is the field total net allowable on that date.

The field as a whole is never exactly in balance. It is to be expected that for some periods of time it will have a total net underage and for other periods of time it will have a total net overage.

20. The Commission finds that in order to prevent waste, protect correlative rights and effectively prorate gas from this field, it will determine market demand as set out in paragraph 16 above and will continue to determine current and net allowables as set out in paragraph 19.

Balancing Period.

21. A study of the history of the monthly proration orders for the Hugoton Gas Field from April, 1956, through November, 1957, leads the Commission to the conclusion that their effect has been to put the field somewhat out of balance, and the Commission must take steps to restore balance to that field eventually or periodically. In order to accomplish this, the Commission recognized that it must prevent the excessive overproduction or excessive underproduction of the wells within the same common source of supply. Therefore the Commission, in Docket No. C-164,

held a public hearing concerned with the advisability of amending paragraph "p" of the Hugoton Basic Proration Order and as a result of this hearing has restored a balancing period requiring the producers in the Hugoton Field to bring each well into balance at stated times as set out therein. The principle of the balancing period has been approved by this Commission numerous times in the past and the Supreme Court of the State of Kansas has at times in the past approved this principle.

22. Periodic balancing has the merit of preventing any wells from remaining excessively overproduced or excessively underproduced. It helps to enforce ratable takings as between all wells in the field. It also has the effect of encouraging producers and pipeline companies to produce and sell their total underages to companies in need of gas and encourage overproduced companies to buy from others to fill their needs.

23. In conformance with the views heretofore expressed, it is, therefore, ordered:

(1) That future determinations of market demand for natural gas from the Kansas Hugoton Field will give effect to the following factors, in addition to nominations of purchasers:

A. Takes from other sources of supply to which the purchasers are connected.

B. The total markets for natural gas of all purchasers from the Kansas Hugoton Field; the rate of increase therein compared to the rate of increase in the takes from the Kansas portion of the Hugoton Field.

C. Takes from other sources of supply in Kansas.

D. Any other factors, conditions and/or circumstances that would aid the Commission in establishing the market demand.

(2) That future monthly net allowables for natural gas for the Kansas Hugoton Field will be determined by adding cancelled underages to the market demand figure as calculated above, and to that total add the total net underage or subtract the total net overage. (See paragraph 19) The future current monthly allowable to be determined as set out in paragraphs 18 and 19.

(3) The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

(4) That this Report and Order shall take effect on February 1, 1958, and that the Secretary of the Commission shall mail copies thereof to all interested parties.

Marion Beatty, Chm., Specially Concurring; Harry G. Wiles, Comr.; Richard C. Byrd, Comr., Specially Concurring.

Raymond B. Harvey,
(Seal) Secretary.

SPECIALLY CONCURRING OPINION.

By Chairman Beatty.

In our findings and Memorandum Opinion we have reached three basic conclusions: They relate to (1) drainage (2) determining of allowables and (3) balancing period.

(1) *Drainage.*

The takes from the Hugoton Field as a whole, and its pressure history, indicate that although the drainage, if any, about which the intervenors complain is negligible at the present time, if the past and present rates of withdrawal from the Kansas portion of the Hugoton Field, as

compared with rates of withdrawal from the Oklahoma portion of the Hugoton Field, continue in the future, there will be drainage of gas from the Kansas portion of the field to the Oklahoma portion thereof. We have made no findings or conclusions as to whether this drainage eventually will be moderate, considerable or devastating. The evidence was inconclusive.

The evidence in regard to the pressure pattern and drainage has been an education and I wish to call it to the attention of the Kansas Legislature for whatever remedial action, if any, the Legislature may see fit to take.

I specifically concur in the findings of fact we have made in regard to drainage, paragraphs 7 to 10 inclusive, but I for one, have never been satisfied that the present statutes give to this Commission the necessary power and authority to remedy this interstate situation, if a remedy there be.

(2) *Determination of Allowable.*

The Commission has concluded that under the system of setting allowables for the Hugoton Field which was in effect up until April, 1956, it was the pipeline companies that were in fact setting allowables for the Hugoton Field. The Commission had the practice of accepting pipeline companies' nominations as a starting point and if these proved to be over or under the actual runs, the market demand for the following month was adjusted accordingly so that the runs, which also were wholly controlled by the pipeline companies, actually were determining allowables.

I concur with the decision made herein to take not only nominations but certain other factors into consideration in setting these monthly allowables, as we have discussed in paragraphs 14 to 19, inclusive, above, so that the

setting of allowables will henceforth be exercised by the State Corporation Commission rather than the industry to be regulated.

(3) *Balancing Period.*

I wish to concur in the restoration of a balancing period as discussed in paragraphs 21 and 22 above. A balancing period was part of the original Basic Order for this field and one is included in most other such basic orders. It acts as a governor and helps to assure that each well will be produced ratably with other wells in the field.

Discussion.

Intervenors have urged us to continue the practice of setting high monthly allowables which was started by the Commission in April, 1956. They have asked us to increase the allowables 25% more even though the Commission since April, 1956, has been allowing somewhat more than the market actually absorbed. This benefited pipeline companies in need of gas, usually those overproduced. It was coercive on those who did not have proportional markets, those usually underproduced. It has not been effective so far, but if and when it has the intended effect of forcing higher takes, it will allow the producers and royalty owners to convert their minerals into cash more quickly. The only visible results in the last nineteen months, however, have been no increase in takes and a gradually mounting net underage. The net allowable is now 52 million M.c.f. higher than the amount that will be actually taken and marketed this month, but if it is carried for awhile, the pipeline companies may find a market for it.

Since my tenure on this Commission, beginning ten months ago, I have been deeply concerned about what is a reasonable net overage or underage for the field and how

far the net balance may fluctuate in either direction before the Commission would be obliged to check it. Testimony of the experts indicates that the present 52 million M.c.f. net underage is not a serious imbalance if the field is eventually brought into balance by increased takes or gradually reduced allowables. This was one of the considerations that caused the Commission to reject the request of some of the parties that we start over and recalculate the allowables for every month back through April, 1956.

I wish to point out that neither the Order and Memorandum Opinion unanimously adopted by the Commission nor the formula adopted necessarily commit this Commission to set artificially high allowables, or allowables at a figure which eventually will permit equalization of pressures between Kansas and Oklahoma, or allowables that will permit a program of planned depletion of the field in thirty years or any given number of years.

It is impossible to prorate the field to fit the pace of both those who want less and those who want more gas. The result has to be somewhere in between and the Commission has some discretion.

If allowables are set high enough, or if high allowables continue long enough, admittedly the result will be to force underproduced pipeline companies to take and dispose of more Kansas gas or suffer cancellation of their underproduced allowables. The higher the allowables, the greater the coercion, the greater the cancellations and the more severe the penalties. I feel that the Commission needs a clearer mandate from the Legislature as its authority to execute this kind of a program for the purpose of forcing up the runs.

I am most heartily in favor of Kansas resources being harvested and marketed by Kansas people and Kansas in-

dustries, rather than by Oklahomans, and my sympathies are with the Kansas royalty owners, some of whom have had to sell their birthright to the pipeline companies for a mess of pottage (as low as 3¢ to 8¢ per M.c.f.) and are now having the pottage rationed to them in small spoonfuls, but whether we, a conservation commission, should try to force the sale and depletion of our natural gas at today's low price, raises another question. Gas is a most desirable fuel. America's reserves of natural gas are being depleted one hundred times faster than our coal reserves. Aside from the question of our authority and jurisdiction to execute such a program under present conservation statutes, such a program may, in retrospect, prove to be very unwise, considering the welfare of the state as a whole.

/s/ Marion Beatty,
Chairman.

MB:tk

SPECIALLY CONCURRING OPINION.

By Commissioner Byrd.

I concur with the findings of fact as set forth in the Commission's report and order. I believe that provisions contained in the order relating to the determination of market demand and the factors to be considered in such determination, if realistically considered by the Commission in the future, can and will result in the prevention of drainage and the protection of correlative rights. However, because of the seriousness of the situation that would be presented by the extrapolation of the present rates of pressure decline of the wells in this field along the Oklahoma-Kansas state line, I feel that the Commission is justified at this time in taking more positive steps to prevent this situation from becoming a reality. The evidence

presented indicated, and the Commission's report and order so finds, that based on the present rates of withdrawal from the Kansas and Oklahoma portions of the Hugoton Field, the average closed-in wellhead pressure for the wells in Oklahoma along the state line are decreasing and will decrease approximately 9 pounds per year; the wells in Kansas along the state line will decrease approximately 5 pounds per year. If those conditions continue to exist, in 1962 the arithmetic average closed-in wellhead pressure for the wells one mile on each side of the Kansas-Oklahoma state line will be 301 pounds in Kansas and 282 pounds in Oklahoma, a pressure differential of 19 pounds. With this differential in pressure, a serious drainage problem would exist.

The threat of this situation's existing is imminent and has been clearly called to the attention of the Commission. To avoid it, without undue hardships being imposed on the purchasers of gas, immediate action must be taken. To delay the institution of preventive measure until this situation actually exists disregards the obligations imposed upon the Commission by the Gas Conservation Statute, particularly when we have been put on notice and are aware of the impending situation. The Statutes grant this Commission broad powers. Should these powers not be sufficient to cope with this imminent threat of drainage, it is best that we become aware of this statutory deficiency before the drainage situation becomes a reality.

The evidence presented in these dockets shows that the demands for gas of the major gas purchasers in the Kansas Hugoton Field have increased substantially the last ten years. The total sales of gas by these companies has increased disproportionately with their withdrawals of gas in the Kansas Hugoton Field. All industry predictions are that the total demand for natural gas will continue to in-

crease in the future. Based on this evidence, I believe the Commission is justified in determining at this time minimum allowables, based upon past and projected market demands of the gas purchasers, for the next 5 years. These minimum allowables should be determined now so that by the year 1962 the minimum allowables would permit the withdrawal of gas from the Kansas portion of the Hugoton Field at a rate equal to the withdrawal of gas from the Oklahoma portion of the Hugoton Field. In other words, the Commission should now establish a goal, and determine minimum allowables by year for the future, that will bring a halt to the steadily increasing pressure drop at the Kansas-Oklahoma state line by the year 1962.

Such a determination is not only justified by the evidence presented in these dockets, and required of us by the Statutes of Kansas, but would better able the gas purchasers to adjust their takes of gas from the various sources of supply to which they are connected in order to meet their market requirements. If our goal is to prevent this future drainage situation, and I believe the Commission's order and report adopts that goal, then I believe the industry should be clearly informed of this intention. Accomplishment of that goal should be done in a method or manner least burdensome to the companies.

As I previously stated, I believe that the provisions of the Commission's order can accomplish the goal that is desired; however, the establishment of a planned depletion allowable as set forth above would, in my opinion, be a more effective means of accomplishing this end.

Richard C. Byrd,
Commissioner.

APPENDIX F

Report and Order of the Commission for the Proration Period October 1, 1959, Through March 31, 1960.

BY THE COMMISSION:

1. This proceeding is to determine the market demand for natural gas in the Kansas Hugoton Gas Field for the proration period of October 1, 1959, to March 31, 1960. Public hearings were duly held on September 25 and 30 and October 1 and 2, 1959, at Wichita, Kansas, at which appearances were entered on behalf of Colorado Interstate Gas Company, Cities Service Gas Company, Northern Natural Gas Company, Republic Natural Gas Company, Kansas-Colorado Utilities, Inc., Pan-American Petroleum Corporation, Southwest Kansas Royalty Owners Association, Panhandle Eastern Pipe Line Company, Kansas-Nebraska Natural Gas Company, Hugoton Production Company, and the Commission staff. Prior to said hearings the Commission requested that all purchasers of gas from the Hugoton Field submit nominations and furnish certain specified information to the Commission before the date set for the hearing. At the hearings on September 25 and 30 and October 1 and 2, 1959, the information so furnished, together with other evidence, was introduced into the record of this proceeding.

EVIDENCE AND FINDINGS OF FACT.

2. The Commission finds that no single formula can be used to ascertain the market demand for natural gas from the Kansas Hugoton Gas Field or any particular field, as the factors and conditions vary from period to

period and from gas field to gas field. In fixing the market demand for the gas from a particular field for a fixed period of time, the Commission should consider all the evidence and recommendations. It would be unwise for the Commission to consider only the nominations submitted by the purchasing companies or the actual takes of gas from a particular field when other evidence submitted indicates that determination of market demand on that basis alone would result in ultimate loss or waste of gas by the premature abandonment of wells or discrimination against a particular gas field by the purchasing companies. Nominations and runs are often controlled or influenced by contracts between the producers and purchasers. These contracts do not necessarily bear any relationship to the market demand for gas from the Kansas Hugoton Gas Field or any gas field, and they are not binding upon the Commission in carrying out its regulatory duties.

3. The nominations of the companies (estimates of their demands) from the Kansas Hugoton Gas Field for said six months' period are 277,801,541 M.c.f. at 14.65 p.s.i.a.

4. The information presented by the companies at the Commission's request shows for the year 1959 that Cities Service Gas Company, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Colorado Interstate Gas Company, and Kansas-Nebraska Natural Gas Company expect to purchase gas from the Kansas Hugoton Field at a lesser rate, based on comparative gas reserves, than from their total reserves and that during the year 1959 Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, and Kansas-Nebraska Natural Gas Company expect to take gas from the Oklahoma Hugoton Field (Guymon-Hugoton) at a greater rate, based on comparative gas reserves, than from the Kansas Hugo-

ton Field. The information also shows that the total markets of the purchasing pipeline companies have increased considerably over the past few years. We find that Kansas Hugoton has not received its fair share of these additional markets.

5. The testimony of Mr. Clifford R. Horn, witness for Panhandle Eastern Pipe Line Company, shows that if the five largest purchasers (purchasing pipeline companies) were to take gas from the Kansas Hugoton Field at same rate, based on comparative gas reserves, as they do from all sources to which they are connected, the Kansas Hugoton Gas Field's fair share of the market would be 653,738,000 M.c.f. for a 12 month period. Analysis of actual runs over a 36 month period shows that 63.03 per cent of the yearly runs are taken in the six months from October to March. Based on this, the market demand for the current period should be 412,051,000 M.c.f. This was the figure recommended by Mr. Horn.

6. Evidence was presented by Republic Natural Gas Company showing that the wells in the Kansas Hugoton Gas Field were capable of sustaining production for many years at a rate considerably higher than the present rate of production. Testimony to this effect was given by Mr. William C. Goodson based on a study of actual runs of 146 wells running continuously for a two to four month period. Mr. William Hurst made a theoretical study applying known principles of physics and petroleum reservoir engineering to observed data. The testimony of Mr. Hurst substantiated the results obtained by Mr. Goodson. Both witnesses qualified as expert petroleum engineers and neither was contradicted.

7. Mr. Goodson also testified that the Kansas Hugoton Field has reserves of approximately 22 trillion cubic feet (22,000,000,000 M.c.f.). He recommended that the

market demand be set at 800,000,000 M.c.f. per year, with 500,000,000 M.c.f. being allocated to the current six month period. This figure was based on a production rate compared to reserves in the Kansas Hugoton Field of four of the five major pipelines compared to the production rate from their total system reserves.

8. Dr. Charles F. Weinaug, witness for the Southwest Kansas Royalty Owners Association, testified that the Kansas portion of the Hugoton Field is being produced at about half the rate that the Oklahoma portion is being produced. He also gave testimony indicating that unless the Kansas Hugoton Field were depleted at a much faster rate, an excessive number of wells will have to be redrilled due to corrosion of well casings.

9. There was no conflict in the evidence relating to drainage of gas from the Kansas Hugoton Field to the Oklahoma portion. Dr. Weinaug, who qualified as an expert witness in petroleum engineering, brought prior studies up to date and testified that between 2,000,000 M.c.f. and 8,000,000 M.c.f. of gas was draining from Kansas into Oklahoma per year. This testimony was substantiated in principle by the testimony of Mr. Hurst, a witness for Republic Natural Gas Company, and was directly substantiated by the testimony of Mr. F. M. Buxton, witness for Kansas-Nebraska Natural Gas Company. The Commission finds that the pressure differential between the wells in the Kansas portion of the Hugoton Field and the Oklahoma portion of the Hugoton Field is increasing, and that drainage is occurring from Kansas into Oklahoma.

10. Assuming the rate of production in Oklahoma to remain the same for the next six months, Dr. Weinaug testified that in order to prevent further drainage, the Kansas portion of the Hugoton Gas Field would have to produce 725,000,000 M.c.f. during the six month period.

This would equalize the pressure on both sides of the Kansas-Oklahoma state line, and thus prevent further drainage into Oklahoma.

11. It is obvious that the prevention of drainage into Oklahoma, the prevention of unnecessary redrilling of wells because of casing corrosion, and a fair share of the total system markets of the pipeline companies are goals to be sought after. It is just as obvious that these goals cannot be achieved in a short time without causing drastic effects in the industry. Therefore the Commission cannot effectuate the recommendations of Dr. Weinaug, and cannot adopt the recommendations of Mr. Horn and Mr. Goodson as to market demand. The Commission notes that past practices have succeeded in getting increased nominations and runs from the Kansas Hugoton Field. The nominations for the current period are 25,000,000 M.c.f. higher than for corresponding periods in recent years, and testimony of witnesses for the pipeline companies indicates that further increases in nominations and runs will occur in the future.

12. The Commission after considering all the evidence presented at the aforesaid hearings and the reasonable current requirements for current consumption and use within and without the state determines the market demand for gas from the Kansas Hugoton Field for the six months' period from October 1, 1959, to March 31, 1960, to be 281,000,000 M.c.f. at 14.65 p.s.i.a. The market demand for each month during this period is found to be:

October	1959	30,291,800	M.c.f.	@	14.65	p.s.i.a.
November	1959	45,100,500	"	"	"	"
December	1959	53,193,300	"	"	"	"
January	1960	54,710,700	"	"	"	"
February	1960	48,725,400	"	"	"	"
March	1960	48,978,300	"	"	"	"

13. In determining the market demand the Commission has considered the needs of each purchasing company for gas from Kansas Hugoton. Under this market demand figure Hugoton Production Company, Colorado Interstate Gas Company, Kansas-Nebraska Natural Gas Company, Panhandle Eastern Pipe Line Company, Kansas-Colorado Utilities, Inc., Quinque Oil and Gas Producing Company, and Shallow Water Refining Company will all receive allowables less than their nominations. Only two companies, Cities Service Gas Company and Northern Natural Gas Company will receive allowables in excess of their nominations.

It is, Therefore, by the Commission Ordered: That the market demand for the six months' period from October 1, 1959, to March 31, 1960, inclusive, be as set out in Finding No. 12 of this order.

By the Commission It Is So Ordered.

Pursuant to this the Commission issued monthly orders spreading the allowable to the individual wells in the feild.

APPENDIX G

March, 1960, Allowable Order.

Now on this 24th day of March, 1960, the above-entitled matter comes before the Commission for consideration and determination of a schedule of production allowable for wells in the Hugoton Gas Field for the month of March, 1960, and the Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) finds:

1. That after notice as provided by the statutes and rules and regulations, the above-entitled matter was heard by the Commission at Wichita, Kansas, on September 25 and 30, and October 1 and 2, 1959, evidence thereon taken and all parties afforded an opportunity to be heard.

2. That the Commission has heretofore determined the market demand for gas from the Kansas Hugoton Gas Field for the month of March, 1960, to be 48,978,300 M.c.f. at 14.65 pounds p.s.i.a.

3. That no evidence was produced at said hearing to show that waste would result or correlative rights would be violated if the wells in the Kansas Hugoton Gas Field were allowed to produce this market demand.

4. That production in excess of said market demand of 48,978,300 M.c.f. plus or minus net underages or overages and plus cancelled underages would result in waste as that term is defined by the Statutes of the State of Kansas; that under the Basic Order No. 44-3-21 entered in Docket No. C-164, as amended, the current allowable for any given period consists of the reasonable market

demand for that period plus the cancelled underage for the prior month of record, and that after giving effect to such cancelled underage as shown by the records of the Commission as of March 1, 1960, the current allowable for the month of March, 1960, should be fixed at 48,978,300 M.c.f.; that the net allowable for any given period consists of the current allowable for that period plus or minus the net underages or overages as the case may be, and that after giving effect to such underages or overages as shown by the records of the Commission as of March 1, 1960, the resulting net allowable for March, 1960, is 201,166,542 M.c.f.; that in order to prevent waste the production of natural gas from said common source of supply should be restricted or limited to said amount for said period.

5. That in order to protect the respective correlative rights of the producers and other interested parties having a right to withdraw gas from the common reservoir and in order to permit the wells and leases therein to currently produce proportionately so that each may ultimately produce approximately the amount of gas underlying it, production quotas for the several developed leases and wells should be established during said period in accordance with the Rule 2 Order No. 44-3-21 entered in Docket No. C-164, as amended.

6. That the acreage attributable to and the individual well deliverability factors of the several wells in said field are in the amounts and figures as set out in the March, 1960, allowable report which is attached hereto, marked Exhibit "A" and hereby referred to and made a part hereof by reference; that the allocation of the allowed production within and between the wells in said common source of supply and the individual well production quotas should be made and established in the manner and form pre-

scribed in said Basic Order No. 44-3-21, entered in Docket No. C-164, as amended, and when so made and established are in the amounts and figures as set out in said schedule Exhibit "A".

7. That such allowable should constitute the maximum permissible production from such wells and leases for the period covered by this order.

It is, Therefore, by the Commission Ordered: That the current allowable for natural gas from the Hugoton Gas Field located in Kearny, Finney, Grant, Haskell, Morton, Stevens, Seward, Stanton and Hamilton Counties, Kansas, for the month of March, 1960, be and it is hereby established at 48,978,300 M.c.f. The resulting total net allowed production of natural gas from said field for said month is 201,166,542 M.c.f. and the same is hereby allocated among the several developed leases and wells in said field in the manner prescribed by said Basic Order No. 44-3-21 entered in Docket No. C-164, as amended, and when so distributed, each well's production quota is in the amount set out in the schedule, Exhibit "A" attached hereto; that production of natural gas from said common source of supply and from each of the developed wells and leases therein shall be limited during the period covered hereby to the respective allowables established for the said field and each of the wells therein.

It Is Further Ordered: That the acreage and deliverability factors and current position of the wells as set out in schedule Exhibit "A" attached to this order, be, and the same are hereby adopted and established.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

By the Commission It Is So Ordered.

EXPLANATION.

HUGOTON FIELD—MARCH, 1960

The allowables shown on Exhibit "A" are computed in accordance with Order No. 44-3-21, the Basic Order for the Hugoton Field. The March current allowable for each well is determined by multiplying the product of its deliverability and acreage factor by $\frac{(48,978,300)}{(4,885,883)}$ 10.02445207 the relationship of the total current allowable to the total deliverability adjusted for acreage.

The letter (-S) following net allowable indicate wells over-produced and to be shut in until reduced in accordance with Basic Order Provisions.

February net allowable	199,002,432 M.c.f.
February runs	46,433,854 Mc.f.
Underage	152,568,578 M.c.f.
March market demand	48,978,300 M.c.f.
March current allowable	48,978,300 M.c.f.
Plus net underage allowed	152,188,242 M.c.f.
March net allowable	201,166,542 M.c.f.

Total adjusted deliverability is 4,885,883

Deliverability standard pressure is 261.9 pounds.

APPENDIX H

In the Matter of Determining the Market Demand for Natural Gas for the Hugoton Gas Field of Kearny, Finney, Grant, Haskell, Morton, Stevens, Seward, Stanton and Hamilton Counties, Kansas, the Deliverability and Acreage Attributable to Each of the Respective Wells Therein, and Fixing Gas Production Percentages and Quotas for Wells Within Said Field for the Proration Period Extending from April 1, to September 30, 1956, Both Inclusive.

Docket Number 51,342-C (C-4888) Conservation Division

Notice of Hearing.

The State Corporation Commission of the State of Kansas, to: All Producers and Purchasers of Natural Gas in Said Hugoton Gas Field, and to All Royalty Owners, Landowners, and to All Persons Whomsoever Concerned, Greetings:

You, and each of you, are hereby notified that on March 6, 1956, an order was entered by the State Corporation Commission of the State of Kansas directing that an investigation be instituted and a hearing held to determine the reasonable market demand for gas produced from the Hugoton Gas Field in the above-named counties in Kansas, for the period extending from April 1, to September 30, 1956, both inclusive; also to determine the deliverability and acreage attributable to each of the wells therein and for the purpose of fixing gas production percentages and quotas for wells within said field, and that at said hearing,

evidence will be received for all the aforesaid purposes and for determining and fixing the allowables for each of said wells in said period.

You, and each of you, are further notified that pursuant to said order, said hearing will be held at the Allis Hotel in the City of Wichita, State of Kansas, on Friday, March 30, 1956, at 9 o'clock a. m.

All purchasers of gas produced from said field are hereby notified to advise the Conservation Division of the State Corporation Commission at its offices, 211 North Broadway, in the City of Wichita, State of Kansas, of their respective requirements for the calendar months included in said proration period, and that said information is to be furnished before the date of said hearing.

All parties in anywise interested or concerned shall take notice of the foregoing and govern themselves accordingly.

State Corporation Commission
of the State of Kansas,
By Raymond B. Harvey,
Secretary.

APPENDIX I

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS.

In the Matter of Cities Service Gas Company, Colorado Interstate Gas Company, Hugoton Production Company, Kansas-Colorado Utilities, Inc., Kansas-Nebraska Natural Gas Company, Panhandle Eastern Pipe Line Company, Quinque Oil and Gas Production Company, United Carbon Company, Shallow Water Refining Company, to Show Cause.	Docket Number 51,488-C (C-4916) Conservation Division.

Order to Show Cause.

Now on this 16th day of March, 1956, the above-entitled matter comes before the Commission on its own motion and the Commission, having examined and considered its files and records and being fully advised in the premises, finds:

1. That this Commission adopted the Basic Proration Order for the Hugoton Gas Field of Kansas, Docket C-164, as a conservation measure pursuant to its statutory duty; that said proration order established well quotas for said field to the end that each developed lease might be enabled to currently produce its daily allowable so that ultimately such developed lease would have an opportunity to produce approximately the amount of gas underlying it.

2. That a question has now arisen whether:

a. There is presently undue, cognizable, preventable and uncompensated drainage of gas from that

portion of the Hugoton Gas Field lying in Kansas to that portion of the Hugoton Gas Field lying outside of Kansas.

b. That developed leases in the State of Kansas are not being permitted to produce in such a way as ultimately to produce approximately the amount of gas underlying such developed leases, but that such gas underlying such developed leases in Kansas is being produced from wells located outside the State of Kansas.

c. That developed leases in the State of Kansas are not being permitted currently to produce proportionately with other developed leases in said Hugoton Gas Field without uncompensated cognizable drainage, between separately-owned, developed leases or parts thereof.

d. That there exists inequitable and unfair taking from the common source of supply and unreasonable discrimination against Kansas landowners, royalty owners and producers.

3. Commission records show that Cities Service Gas Company, Colorado Interstate Gas Company, Hugoton Production Company, Kansas-Colorado Utilities, Inc., Kansas-Nebraska Natural Gas Company, Inc., Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Quinque Oil and Gas Producing Company, United Carbon Company and Shallow Water Refining Company are the sole purchasers of natural gas produced in the Hugoton Gas Field of Kansas.

4. That the questions above set forth have established the possibility that waste, injury to correlative rights, and inequitable or unfair taking of gas from the Hugoton common source of supply, as prohibited by the gas conservation statutes of Kansas (G.S. 1949, 55-701 *et seq.*), may be occurring.

5. That the companies listed in Finding No. 3 above and any and all other parties of interest should be permitted to show cause, if any there be, at a hearing hereinafter provided for, why they should not be required to take ratably from the various wells in the Hugoton Gas Field in the State of Kansas in order to prevent discrimination, uncompensated cognizable drainage, inequitable taking and waste as prohibited by Kansas statutes.

6. That each of the companies listed in Finding 3 hereof should be required to file with the Acting Director of the Conservation Division, 211 North Broadway, Wichita, Kansas, not less than five days prior to the hearing date hereinafter provided for, the following information:

a. Copies of the basic data upon which its "nominations" heretofore furnished to the Commission are based or computed, showing the factors upon which it allocates its demand to various sources of supply and to the various states in which they are located, and the computations resulting in its nominations for the six months from April 1, 1956, to September 30, 1956, inclusive.

b. The amount of developed reserves underlying all acreage connected to its transmission system, in all sources of supply, as of December 31, 1954, and December 31, 1955, separately stated as to fields and states.

c. The production during the years 1954, 1955, and during the first three months of 1956 from each such separate fields and states by months.

d. For each of such fields and states, the ratio of such production during 1954 and 1955 to such developed reserves.

e. Its ultimate prospective consumer demand for gas for the period from April 1, 1956, to September 30, 1956, inclusive.

It Is, Therefore, by the Commission Ordered: That Cities Service Gas Company, Colorado Interstate Gas Company, Hugoton Production Company, Kansas-Colorado Utilities, Inc., Kansas-Nebraska Natural Gas Company, Inc., Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Quinque Oil and Gas Producing Company, United Carbon Company, and Shallow Water Refining Company, be and each is hereby required to file with the Acting Director of the Conservation Division, 211 North Broadway, Wichita, Kansas, not less than five (5) days prior to the hearing date March 30, 1956, the information more particularly set out in Finding No. 6 hereof.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

By the Commission It Is So Ordered.

/s/ Raymond B. Harvey,

(Seal) Secretary.

APPENDIX J

Summary of Commission Orders from April of 1956 through March of 1960

	Nominations MCF	Mkt. Demand Corp. Comm. MCF	Runs MCF	Canceled Underage MCF	Accumulated Underage MCF
1956					
April	33,493,000		32,909,078	18,157	(1,189,104)
May	33,000,000		24,552,168	21,449	646,016
June	32,700,000		22,469,654	15,531	8,513,111
July	30,000,000		20,079,190	9,747	10,329,240
Aug.	27,480,500		20,519,581	11,435	10,004,854
Sept.	29,050,000		21,236,857	6,212	16,991,298
Oct.	33,486,000		23,013,346	10,250	24,840,220
Nov.	37,245,000		36,622,641	15,165	35,378,844
Dec.	41,382,000		43,720,318	7,299	36,091,203
1957					
January	42,656,000		48,384,897	6,789	33,913,505
Feb.	44,482,868		40,580,730	200,869	28,131,597
March	40,246,727		42,015,659	36,031	32,211,496
April	36,362,500		34,625,171	33,965	30,674,034
May	29,430,250		25,575,498	30,139	32,442,442
June	23,714,500		18,791,172	42,165	36,396,637
July	23,812,250		21,172,908	12,715	41,436,238
Aug.	24,164,000		22,537,460	9,513	44,095,591
Sept.	25,938,000		22,164,829	18,618	45,730,223
Oct.	33,341,000	33,341,000	30,746,865	10,797	49,754,703
Nov.	41,907,000	41,907,000	43,176,955	12,267	52,403,042
Dec.	47,087,000	47,087,000	47,434,890	10,582	51,158,330

	Nominations MCF	Mkt. Demand Corp. Comm. MCF	Runs MCF	Canceled Underage MCF	Accumulated Underage MCF
1958					
January	48,594,000	48,594,000	45,111,495	48,687	50,824,021
Feb.	42,254,000	42,254,000	40,751,291	67,464	54,184,340
March	41,373,000	41,373,000	41,651,732	43,670	55,950,126
April	31,253,881	31,253,881	31,658,087	18,894	55,710,571
May	29,886,976	29,886,976	20,900,175	18,894	55,325,252
June	25,033,344	25,033,344	18,740,258	20,018	64,400,043
July	25,750,140	25,750,140	15,362,279	20,196	70,683,400
Aug.	25,127,432	25,127,432	20,584,764	(6,342)	81,149,824
Sept.	25,719,906	25,719,906	17,913,167	14,745	84,917,046
Oct.	39,831,450	39,831,450	21,972,808	807,613	92,770,595
Nov.	41,564,900	41,564,900	32,891,442	12,402	111,649,290
Dec.	45,185,900	45,185,900	41,726,225	28,350	120,192,775
1959					
January	49,265,934	49,265,934	43,167,634	111,554	123,580,554

NOTE: The first set of appeals under the old Gas Conservation Act before its amendment ended with the order of January, 1959. The second set of appeals under the new amended Gas Conservation Act began with the order of October, 1959. The orders in between, i.e., February, 1959 through September, 1959, were contested but remain in the District Court on petitions for judicial review to be held pending the outcome of the other appeals.

Oct.	37,007,500	30,291,800	34,452,889	4,781,484	130,235,730
Nov.	47,048,312	45,100,500	42,060,672	5,214,782	129,341,241
Dec.	48,943,919	53,193,300	45,582,115	4,094,787	134,898,946
1960					
January	50,525,412	54,710,700	47,237,039	None	143,593,313
Feb.	46,698,320	48,725,400	46,433,854	None	150,287,182
Mar.	47,578,078	48,978,300	45,716,788	None	152,188,242

APPENDIX K

Petition for Judicial Review.

Comes Now the Petitioner, Colorado Interstate Gas Company, and for its Petition for Judicial Review herein against the above named Respondent, alleges and shows to the court as follows:

(1) That Petitioner is a corporation, organized under the laws of the State of Delaware, with its principal office at Colorado Springs, Colorado, and duly licensed to transact business in the State of Kansas.

(2) That Respondent, The State Corporation Commission of the State of Kansas, is an administrative body, created by legislative enactment, with its principal place of business and post office address at State Office Building, Topeka, Kansas, but the Conservation Division thereof having its place of business and address at 500 Insurance Building, Wichita, Kansas; that Marion Beatty is Chairman of said Commission, and Harry G. Wiles and Richard C. Byrd are members of said Commission.

(3) That this is an action under G. S. 1949 55-707 for a judicial review of proceedings before the State Corporation Commission of the State of Kansas in its Docket No. 51,342-C (C-4888), its Docket No. 53,042-C (C-5171), its Docket No. 54,220-C (C-5454) and its Docket No. 51,488-C (C-4916) wherein it issued its "Report and Order of the Commission" which, although undated, is made effective on February 1, 1958. That said Report and Order was signed by all of the Commissioners, but the Chairman, Marion Beatty, and Commissioner, Richard C. Byrd, each wrote a specially concurring opinion. That a full and complete

transcript of the proceedings had in each and all of the aforesaid dockets, together with all exhibits thrrein introduced and attached thereto, is filed in this Court and made a part hereof, in the same manner and to the same extent as though set out herein verbatim.

(4) That Petitioner is an interstate pipeline company and is a taker and purchaser of natural gas in The Kansas Hugoton Field. That on March 30, 1956, a hearing was had in Wichita, Kansas, before this Respondent for the purpose of determining the market demand for natural gas in the Hugoton Field of Kansas for the proration period extending from April 1, 1956, to September 30, 1956, both inclusive, in said Docket No. 51,342-C (C-4888). That also at the same time there was called up for hearing before said Respondent Commission a certain "Show Cause" proceeding instituted by the Commission in Docket No. 51,488-C (C-4916) wherein this Petitioner and other pipeline companies purchasing in the Hugoton Field were required to show cause why they should not be required to take ratably within the Hugoton Field and whether or not there was reason to suspect that Kansas Hugoton Gas was being drained by Oklahoma Hugoton wells. Petitioner was made a party and was required to show cause although it is not a "taker" from the Oklahoma Hugoton Field. That said dockets, being the Market Demand Docket and the Show Cause Docket, were consolidated solely for the purpose of hearing said matters on a joint or common record. That on May 24, 1956, on June 28, 1956, and on August 30, 1956, further continued hearings were had in such same two dockets, said hearings being had on a common record.

(5) That on September 28, 1956, a hearing was had before this Respondent at Wichita, Kansas, in Docket No. 53-042-C (C-5171) being a market demand hearing for the

Hugoton Field for the period extending from October 1, 1956, to March 31, 1957, both inclusive.

(6) That on March 29, 1957, a new market demand hearing was heard before this Respondent at Wichita, Kansas, in Docket No. 54,220-C (C-5454) for the proration period extending from April 1, 1957, to September 30, 1957, both inclusive. That on April 23, 1957, and again on August 27, 1957, further hearings were had on the Market Demand Docket No. 54,220-C (C-5454) and at the same time and on those same dates a hearing was had in the "Show Cause" Docket, being No. 51,488-C (C-4916), which dockets were also consolidated for purpose of hearing only.

(7) That all gas proration orders for the Hugoton Field issued by this Respondent for the period extending from April 1, 1956, through November, 1957, have been in each and every case denominated an "Interim Order" and therefore subject to later modification by the Commission, in accordance with the facts as the same might be finally established as a result of said hearings. That it was understood by this Respondent, this Petitioner, and each and all the parties involved, that each Interim Order issued since April, 1956, was issued without prejudice to the rights of this Petitioner, and all other parties, to challenge the validity of each and every such Interim Orders upon the issuance by Respondent of a final order with respect thereto.

(8) That each and all of the Interim Orders issued by Respondent during said period did not follow the method authorized and required and theretofore followed pursuant to the Basic Proration Order for the Hugoton Field, in determining the current allowables for each well, each month. That the current allowable for wells was determined, prior to May, 1956, by taking the market demand based upon nominations made by gas purchasers in the

Hugoton Field and first adding thereto the cancelled underages for the previous month and then *subtracting* therefrom the amount of underproduction, or *adding* thereto the amount of overproduction, for the previous month. That beginning with the month of August, 1956, and thereafter in all Interim Orders issued for the aforesaid period Respondent no longer followed the practice of subtracting underproduction, or adding overproduction for the previous month, but allowed each well to continue to carry, in addition to its current allowable, such underproduction or overproduction as may have accrued to it. That this method of calculating allowables resulted in the creation and establishment of a "fictitious market".

(9) That the Report and Order of this Commission effective February 1, 1958, which this Court is here asked to review, shows in the caption of said order that the Show Cause Docket No. 51,488-C (C-4916) was a part of said order, and the findings of fact set out in said Report and Order show that the evidence heard in the Show Cause docket was considered by Respondent and entered into its determination as to the various market demand dockets. Nevertheless the order of the Commission completely fails to make a final determination, or in fact any determination, in the Show Cause docket. That Respondent was undoubtedly influenced by the Show Cause Docket, to some undisclosed extent. That in order for the Report and Order covering the market demand dockets, to be a valid and proper order of Respondent, it is necessary that Respondent should have first made specific findings in the Show Cause Docket and thereafter specifically determined such matters in its order.

(10) That an examination of said Report and Order reveals that the caption thereof failed to include Docket No. 55,705-C (C-5792). However, in paragraph 11 of said

Order. Respondent attempts to make disposition of matters involved in said docket, thus creating a conflict between the caption of the Order and the body of the Order.

(11) That in paragraph 11 of said Report and Order, the interpretation placed upon the prior Interim Orders by Respondent is that such Interim Orders were in fact Final Orders, insofar as they determined the allowables for each month. That this interpretation of its orders, as made by this Respondent, is arbitrary, unreasonable and without basis in law and in fact and constitutes an attempt by an administrative agency to prevent the judicial review of its interlocutory orders. That if this interpretation is permitted to stand it will make each of said Interim Orders a Final Order as of the date of issuance thereof, although each of said orders when entered were, at each particular time, understood by this Respondent, this Petitioner, and each and all of the parties involved, as being what they purport to be, that is interim or temporary orders. That it was understood by this Respondent and each and all of the parties involved, that each "Interim Order" issued since April, 1956, was issued without prejudice to the rights of this Petitioner and all other parties to challenge the validity of each such "Interim Order", upon the issuance by Respondent of a Final Order in respect thereto. That this self interpretation by Respondent that its "Interim Orders" are "Final Orders" will deprive all parties aggrieved by each and every of such Interim Orders, and in particular this Petitioner, of its present right of appeal to this Court, as guaranteed under the due process clause of the Constitution of the United States and the Constitution of the State of Kansas.

(12) That the Report and Order of Respondent constitutes an arbitrary, unauthorized and unlawful attempt on the part of Respondent to regulate operations of Peti-

tioner with respect to its interstate operations and its interstate markets, and is a direct interference with the regulatory authority and jurisdiction of the Federal Power Commission, as granted to said Federal Power Commission by the Congress of the United States under the Natural Gas Act, 15 U.S.C.A., Sec. 717. That said interference and usurpation of jurisdiction by Respondent if permitted and sustained, would result in Respondent being able to do the following:

(a) It could in effect require the construction of additional facilities by this Petitioner and other pipeline companies in order to purchase gas in the quantities ordered.

(b) That the interstate rates of Petitioner, as determined by the Federal Power Commission, are determined in part upon the composite cost of gas from all sources of supply from which it takes. Accordingly, an arbitrary allocation of volumes of gas, based upon a fictitious market and fictitious market demand, to be taken from the Kansas Hugoton Field as attempted herein by Respondent would result in an increase in such costs and an interference with the jurisdiction of the Federal Power Commission in fixing consumer rates.

(c) It could result in the reserves of one company, which are supporting and sustaining certificates of public convenience and necessity covering the construction of facilities as authorized by the Federal Power Commission, to be lost to such company through the cancellation of underages, accumulating underallowables based upon an arbitrary and fictional market demand authorized by said Report and Order.

(13) That said Report and Order if permitted to stand will constitute an unlawful interference with the contract and property rights of Petitioner contrary to the

provisions of the Constitution of the United States of America and the Constitution of the State of Kansas. That if Petitioner is required to purchase gas in Hugoton, in excess of its market demands, it will of necessity have to reduce its "takes" below contract requirements in other sources of supply, both within and without the State of Kansas, to the detriment of the parties who have contracted with us in good faith, to our own detriment and to the detriment of our customers.

(14) That said Report and Order in general, and in paragraphs 18 and 19 thereof in particular, and in paragraph (2) of the Order itself, attempts to create and establish a fictitious market demand. That the actual order issued by Respondent in said Report and Order reads in part as follows:

> "(1) That future determinations of market demand for natural gas from the Kansas Hugoton Field will give effect to the following factors, in addition to nominations of purchasers:
>
> "A. Takes from other sources of supply to which the purchasers are connected.
>
> "B. The total markets for natural gas of all purchasers from the Kansas Hugoton Field; the rate of increase therein compared to the rate of increase in the takes from the Kansas portion of the Hugoton Field.
>
> "C. Takes from other sources of supply in Kansas.
>
> "D. Any other factors, conditions and or circumstances that would aid the Commission in establishing the market demand.
>
> "(2) That future monthly net allowables for natural gas from the Kansas Hugoton Field will be determined by adding cancelled underages to the market demand figure as calculated above, and to

that total add the total net underage or subtract the total net overage. (See Paragraph 19) The future current monthly allowable to be determined as set out in paragraphs 18 and 19."

That Respondent Commission has no power and authority under the Statutes of Kansas to create or establish a market, but is required by law to prorate and divide the *true market* which actually exists, between the various pipeline purchasers, so that all producers and royalty owners shall be permitted to produce and sell,

> "* * * only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease, and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. * * *" G.S. 1949, 55-703.

That such method of determining market demand is not authorized under the Conservation Statutes of the State of Kansas; nor the Basic Proration Order for the Hugoton Field, in that it requires the Commission to take into consideration the market demand for areas lying outside the common source of supply. That it disregards the actual volumes of gas produced from the field and the nominations of purchasers, in establishing such market demand. That there is no actual or real relation between a fictitious market demand so established and the market demand as the same actually exists. That market demand determination in accordance with said Report and Order will constitute an arbitrary increase, without basis either in fact or in law, in the net allowables since it requires the addition of accumulated underages to market demand in

determining such net allowables, thereby effectively preventing an adjustment of production to the actual demands for gas from the field.

(15) That said Report and Order in attempting to make the various "Interim Orders" into Final Orders and in proceeding in the future to calculate allowables on the new basis and method now to be followed by the Respondent, is thereby establishing fictitious and arbitrary markets and is and will create allowables which cannot be bought, produced and sold, and has and will therefore cause, tremendous "underages" to accumulate. That such practice during the past period of time herein involved, and the continuation of such practice, in the future, has resulted, and will continue to result, in proration being no longer in effect in the Hugoton Field, and with correlative rights of royalty owners, producers and pipeline companies being no longer protected but being irreparably damaged.

(16) That all of Petitioner's gas purchase contracts in the Hugoton Field provide that Petitioner shall "take or pay for" all of the allowables granted to each well to which it is connected. That the creation of arbitrary allowables which have no reasonable relationship to market demand could result in Petitioner being deprived of its property without due process of law.

(17) That said Report and Order is contrary to the evidence introduced at the respective hearings before Respondent in that such evidence wholly failed to establish that any waste was being committed within the Kansas Hugoton Field or that there was uncompensated, cognizable drainage between any of the wells producing within the Kansas Hugoton Field or that discrimination existed between the producers in said field prior to the issuance of the Show Cause Order and in the procedures followed in fixing allowables for the field prior to April, 1956.

(18) That true market demand can be neither more nor less than the amount of gas this Petitioner, or any other pipeline company, will purchase, transport and sell during any particular period. That the Interim Orders heretofore issued during the period involved, as well as any future proration orders to be issued under said Report and Order, were not and will not be based upon nominations made by the pipeline purchasers including this Petitioner, but were and will be based solely upon what Respondent *thought and thinks the market demand for Hugoton gas ought to be.* That the evidence introduced at all of said hearings wholly failed to establish any reason for changing the method of determining market demand and calculating current monthly allowables.

(19) That the said Report and Order constitutes an arbitrary, unauthorized and unlawful attempt on the part of Respondent to regulate operations of Petitioner with respect to its interstate operations and interstate markets and is in direct interference with the regulatory authority and the jurisdiction of the Federal Power Commission as granted to said Federal Power Commission by the Congress of the United States under the Natural Gas Act, 15 U.S.C.A. Sec. 717.

(20) That said Report and Order impairs the interstate operations of Petitioner and impairs its contract and property rights in violation of Section 17, Article 2 of the Constitution of the State of Kansas, and Sections 8 and 10, Article I and the 14th Amendment of the Constitution of the United States.

(21) That said Report and Order is unreasonable, arbitrary, unlawful and inconsistent with the provisions of the Basic Proration Order for the Hugoton Field, as amended, and the Statutes of Kansas in that, if said Re-

port and Order is permitted to remain in effect, it will impair, rather than protect, the correlative rights of the mineral and leasehold owners within the Hugoton Field of Kansas, and encourage, rather than prevent, the commission of waste within said field, and will result in discrimination between the various parties taking gas from said field, all in violation of the Conservation Statutes of the State of Kansas and the Basic Proration Order for said field, as amended.

(22) That Petitioner caused the aforesaid errors and inadequacies to be specifically called to the attention of Respondent in its Petition for Rehearing timely filed on February 7, 1958, persisted therein and overruled such Petition for Rehearing by its Order dated February 12, 1958.

(23) That for all the reasons hereinabove stated and alleged Petitioner respectfully asks the Court at this time to immediately and forthwith grant a stay of execution of enforcement of all of the proration orders issued by this Respondent for and during the period from May, 1956, down to and including the month of October, 1957, so that the allowables thereby unlawfully established shall not, pending the final determination herein, be deemed to be valid and enforceable. That said relief is necessary in that Petitioner will suffer irreparable injury unless such stay is granted in that:

(a) Through the cancellation of allowables Petitioner will lose gas presently under contract to it;

(b) That wells under contract to it will suffer drainage;

(c) That it will be forced to pay for substantial volumes of gas which it will be unable to purchase and market due to the inadequacy of its present market for such volumes of gas;

(d) That its ability to serve its market as now required under existing orders of the Federal Power Commission will be seriously impaired, and

(e) That its ability to fill its contract covering the purchase of gas in other sources of supply both within and without the State of Kansas will be seriously impaired.

(24) That Petitioner represents to this Court that it will diligently purchase, pay for, and transport in interstate commerce for resale, all gas that can be lawfully produced from the wells to which it is connected, under lawful allowables which are within the market demand limits established by the nominations and corrected nominations, filed from time to time with said respondent Commission, and which allowables are corrected from time to time by deduction of "underages" as was done by the Kansas Corporation Commission prior to April 1, 1956. That said stay of execution should be granted for the reasons stated, and, also, for the further reason that the proration periods involved, being for the periods from May 1, 1956, to October 31, 1957, both inclusive, have already expired and therefore no damage will be done to any party, and Petitioner will possibly be spared irrevocable damage.

Wherefore, Petitioner Prays:

(a) That this Court grant instanter a stay of execution of enforcement of the Report and Order, effective February 1, 1958, and of all monthly proration orders heretofore issued, for the period from May 1, 1956, to October, 1957, inclusive, so that such unlawful allowables shall not be valid and enforceable prior to a final determination herein of their status;

(b) That this Court enter an order finding that said Report and Order issued by this Respondent, effective

February 1, 1958, is unreasonable, arbitrary, unlawful and void and that all proration orders issued thereunder for the period of time involved are unreasonable, arbitrary, unlawful and void and that all of said proration orders be corrected and amended to show that the pipeline runs from the field during said period of time were and are the true market demand for that period;

(c) That this Court enter an order finding that this Respondent has no statutory power under the Laws of Kansas to create or establish a market and that in that regard its jurisdiction is limited to proper proration of that market which does exist, as between the various leases and the pipeline purchasers so that waste will be prevented, and the correlative rights of royalty owners, producers and pipeline purchasers, will be fully protected; and

(d) That Petitioner be granted any and all other relief to which it may be entitled hereunder.

APPENDIX L

Report of the Kansas State Corporation Commission to the Legislature of Kansas Concerning the Kansas Hugoton Field

"HUGOTON GAS FIELD.

"We wish to call to the attention of the Legislature the facts ascertained in approximately one and one-half years of hearings in Dockets Nos. 51,342-C, 53,042-C, 54,220-C, and 51,488-C, resulting in the Memorandum Opinion handed down January 23, 1958.

"In these hearings we found that because of the greater runs out of the Oklahoma portion of the Hugoton Gas

Field and faster pressure declines there, drainage of gas from Kansas into Oklahoma was imminent.

"The Corporation Commission has the power, in the interest of conservation, to enter such orders as may be necessary to prevent waste of gas and to protect correlative rights.

"The Commission needs, however, a clearer mandate from the Legislature as to whether it has or should have the authority to order a **planned depletion** of the field in a given number of years or to order greatly increased allowables designed to prevent drainage across the state line as was urged upon us in the above captioned matters. If successful this course of action would equalize pressures between Kansas and Oklahoma and enable Kansas royalty owners and producers to convert their mineral rights into cash more quickly, in less than 40 years, the present life of the field. (See complete order in re Hugoton Gas Field drainage problem elsewhere in this Biennial Report.)" (Our Emphasis.)

APPENDIX M

Colorado Interstate Gas Company's Specification of Errors.

I.

The trial court erred in its Judgment entered May 26, 1960, upholding the Report and Order of the State Corporation Commission for the proration period October 1, 1959, through March 31, 1960, and in upholding in part the monthly allowable orders entered by such Commission beginning in October, 1959, and ending in March, 1960, all as being valid under the laws of the State of Kansas, in that

(a) The Commission was given no authority under the Gas Conservation Act of Kansas or under the Amended Gas Conservation Act to depart from its original construction, long adhered to, pursuant to which field underage was subtracted to arrive at the allowable figure spread to all the wells in the Kansas Hugoton Field, and specifically was not authorized to add such underage to determine the amount of gas which can be produced during the proration period from the Kansas Hugoton Field.

(b) The title to Senate Bill No. 24, Chap. 237 of Session Laws of 1959 (Amendment of the Gas Conservation Act, G.S., 1959 Supp., 55-703), is defective and deficient to encompass its subject matter.

(c) The title to Senate Bill No. 24, Chap. 237 of Session Laws of 1959 (Amendment to the Gas Conservation Act, G.S., 1959 Supp., 55-703), is invalid since it fails to cover all the purposes of said Gas Conservation Statute.

(d) The Amendment to the Gas Conservation Act, G.S., 1959 Supp., 55-703, is unconstitutional and void for seeking to delegate legislative power to the State Corporation Commission.

(e) In all events such amendment (Senate Bill 24, Chap. 237 of Session Laws of 1959) to said Section 55-703 is not self-executing and the Commission has taken no steps to effectuate the new material and the trial court erroneously interpreted statutes of the State of Kansas on which the Commission orders are purportedly based.

(f) The State Corporation Commission has no authority under the valid state statutes and the Constitution of the State of Kansas to issue the orders here being reviewed and, in fact, has violated the state statutes and Constitution by failing to issue orders insuring that the runs from the Field are currently ratable and will ultimately allow each developed lease to produce the gas underlying such lease.

II.

The trial court erred in its judgment entered May 26, 1960, sustaining the Report and Order of the Commission issued for the six months' proration period October 1, 1959, through March 31, 1960, and in sustaining in part the monthly allowable orders issued by the State Corporation Commission for the months beginning October, 1959, and running through March, 1960, since such orders are unlawful, unauthorized, unconstitutional and in violation of the Constitution and laws of the United States, and particularly:

(a) Such orders are in violation of the Natural Gas Act, 5 U.S.C. 717, and the powers thereunder conferred on the Federal Power Commission.

(b) Such orders transcend the power of the state under the Commerce Clause of the Constitution of the United States.

(c) Such orders unlawfully infringe upon the private rights of Colorado Interstate Gas Company and thus are in violation of the Contract Clause (Section 10, Article I) of the Constitution of the United States.

(d) Such orders deny due process (contrary to the 14th amendment) to Colorado Interstate Gas Company and are not a valid exercise of the police power of the State of Kansas.

III.

The trial court erred in overruling and denying Colorado Interstate's motion for a new trial.

IV.

The trial court erred in its judgment of May 26, 1960, in affirming in whole or in part said orders of the said Commission since such judgment is contrary to the undisputed evidence as applied to the operations of Colorado Interstate in the sales of natural gas to it in the field by producers thereof for transportation and sale in interstate commerce.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 75

COLORADO INTERSTATE GAS COMPANY,
a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

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IN THE

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Panhandle Eastern Pipe Line Company, appellee, moves to dismiss this appeal from the judgments of the Supreme Court of the State of Kansas on the grounds that such judgments rest on adequate nonfederal bases, that the alleged federal question was not properly raised and that no substantial federal question is presented.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas are reported at 192 Kan. 2, 386 P.2d 266 (Jurisdictional Statement A1), and 192 Kan. 29, 386 P.2d 288 (Jurisdictional Statement A43).

JURISDICTION

Appellant attempts to invoke the jurisdiction of the Supreme Court of the United States under 28 U.S.C., § 1257 (2)

QUESTIONS PRESENTED

Whether the judgments of the Supreme Court of the State of Kansas rest on adequate nonfederal bases, whether any federal question was properly raised and whether the State Corporation Commission of the State of Kansas or private pipe line companies shall fix the amount of natural gas to be produced from the Kansas Hugoton gas field.

STATEMENT

This case concerns orders entered by the State Corporation Commission of the State of Kansas.[1] In 1956, the Kansas Commission began hearings to reconsider the method by which it calculated the amount of natural

1. Cases related to this proceeding and on appeal to this Court are No. 83, *Northern Natural Gas Company et al.* v. *State Corporation Commission of the State of Kansas et al.*, and No. 140, *Kansas-Nebraska Natural Gas Company, Inc.*, v. *The State Corporation Commission of the State of Kansas et al.*

gas to be produced from wells located in that part of the Hugoton gas field situated in the State of Kansas. Prior to that time, the Kansas Commission had, after hearings and in the manner described below, fixed the amount of gas to be produced from the Kansas Hugoton field on the basis of monthly estimates submitted by the pipe line companies purchasing gas from that field. Each month the Kansas Commission accepted without question the pipe line companies' estimates, adding to the total estimates the amount of gas, if any, taken in the prior month in excess of the amount fixed by the Commission for that month and subtracting the amount, if any, which under the Commission's order for the prior month any company or companies could have taken but failed to take. Thus, the amounts of gas actually taken by the companies controlled the Kansas Commission's determinations (Jurisdictional Statement A10-A12, A32-A33). The Kansas Supreme Court held that the practice of subtracting amounts of gas not taken was unauthorized under both the applicable Kansas Statute and the Kansas Commission's own orders (*id.* at A30-A34).

Beginning in May, 1956, the Kansas Commission employed several variations in its procedure, finally adopting a method based largely upon the total of the pipe line companies' estimates. The most significant change in the Kansas Commission's procedure was that the amount of gas not taken under the prior month's determination was no longer subtracted from the amount determined by the Commission to be necessary to satisfy the market demand for gas for the current month (*id.* at A12-A13). This has made available to the pipe line companies additional quantities of gas, and the appellant contends that this is unlawful.

Three types of orders issued by the Kansas Commission are involved in this appeal: (1) monthly orders for each month from May, 1956, through January, 1959, and from October, 1959, through March, 1960, fixing the amount of gas available to be produced in each of those months; (2) semiannual orders determining the market demand for gas from the Kansas Hugoton field for six months' periods (October through March and April through September); and (3) a general order effective February 1, 1958, specifying the method by which the Kansas Commission proposed to determine the amount of gas to be produced by each well in the field. Ultimately, these orders were reviewed by the Supreme Court of the State of Kansas in seven separate cases and disposed of in two opinions.

1. **Proceedings Arising in the District Court of Finney County, Kansas.**

Appellant petitioned the District Court of Finney County, Kansas, for judicial review of the Kansas Commission's orders. In each instance this appellee, Panhandle Eastern Pipe Line Company ("Panhandle"), and the appellee Southwest Kansas Royalty Owners Association ("Royalty Owners") intervened.

(a) Kansas Supreme Court Cases 41,515 and 41,555. The Finney County District Court entered judgment reversing and setting aside the Kansas Commission's orders covering the period from May, 1956, through September, 1958, insofar as they permitted production of gas in excess of that which would have been permitted under the Commission's previous practice (Jurisdictional Statement A58-A61; A64-A67). Appeals were taken from such judgment by Panhandle, the Kansas Commission and the Royalty Owners, all being docketed by the Kansas Supreme Court as Case 41,515.

Subsequently, the Finney County District Court entered judgment reversing and setting aside to the same extent the Kansas Commission's monthly orders covering the period from October, 1958, through January, 1959, and the semiannual order estimating market demand for the period from October, 1958, through March, 1959 (Jurisdictional Statement A70-A74). Appeals also were taken from such judgment by Panhandle, the Commission and the Royalty Owners, all being docketed by the Kansas Supreme Court as Case 41,555.

Cases 41,516 and 41,556, to which appellant is not a party, involve proceedings initiated by Northern Natural Gas Company for judicial review of the same orders. Northern Natural has also taken an appeal to this Court. See No. 83, October Term, 1964.

Cases 41,515 and 41,555, together with Cases 41,516 and 41,556, were disposed of by the Kansas Supreme Court in a single opinion appearing at 192 Kan. 2, 386 P.2d 266 (Jurisdictional Statement A1). Included among the reasons given for reversing the judgments of the Finney County District Court are the following nonfederal grounds:

First, no timely applications for rehearing were filed with the Kansas Commission respecting the orders issued prior to November, 1957 (*id.* at A14-A17). Under the procedure prescribed by Section 55-606 of the Kansas General Statutes (G.S. 1949, 55-606), a timely petition for rehearing filed with the Commission is prerequisite to judicial review.

Second, the Kansas Commission's general order (effective February 1, 1958), describing the procedure which the Commission proposed to follow in the calculation of the amount of gas which may be produced by wells in the

Kansas Hugoton field, was construed by the Kansas Supreme Court to have only prospective application. Judicial review is unavailable until the Commission implements the general order (Jurisdictional Statement A18-A19).

Third, when the Finney County District Court set aside the Kansas Commission's monthly orders from May, 1956, through January, 1959, it exceeded its statutory authority and erroneously substituted its determinations for those of the Commission (*id.* at A19-A22). The trial court's erroneous judgments appear in Appendix C to the Jurisdictional Statement as follows:

Orders Covering the Period	Jurisdictional Statement
May, 1956, through August, 1958	A58-A61
May, 1956, through November, 1957	A61-A63
September, 1958	A64-A67
October, 1958, through January, 1959	A67-A69

The trial court's error on this point had a more widespread effect, in terms of the number of orders involved, than any of the trial court's other reversible errors.

Fourth, the Finney County District Court disregarded its statutory duty to make findings of fact and conclusions of law when requested to do so by Panhandle (Jurisdictional Statement A23-A24).

Fifth, as discussed in detail in its opinion reported in 192 Kan. 29, 386 P.2d 288 (Jurisdictional Statement A43),

the Kansas Supreme Court held that the Finney County District Court lacked jurisdiction to review the semiannual market demand order for October, 1958, through March, 1959, and monthly orders for October, 1958, through January, 1959, because petitions for judicial review of the same orders had been filed earlier in the District Court of Stevens County, Kansas (Appendix A). Proceedings in the Stevens County District Court to review these orders have been continued pending disposition of the instant appeal (Appendix B).

(b) Kansas Supreme Court Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated). The Finney County District Court entered judgment affirming the Kansas Commission's semiannual market demand order for October, 1959, through March, 1960, and affirming in part and reversing in part the orders for each month during that period (Jurisdictional Statement A76-A80). Appeals were taken from such judgment and consolidated with other similar appeals, all such appeals being docketed by the Kansas Supreme Court as Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated). These cases were disposed of by the Kansas Supreme Court in the opinion appearing at 192 Kan. 29, 386 P.2d 288 (Jurisdictional Statement A43), on the nonfederal ground that exclusive jurisdiction to review the Commission's October, 1959, through March, 1960, orders was vested in the Stevens County District Court, petitions for judicial review having been filed there earlier than in the Finney County District Court.

2. **Proceedings Arising in the District Court of Stevens County, Kansas.**

The Royalty Owners and Panhandle petitioned the Stevens County District Court for judicial review of the Kansas Commission's orders described in the preceding

paragraph (b). That court affirmed such orders, and from its judgment an appeal was taken to the Kansas Supreme Court, being docketed there as Case 42,038. The appellant was not a party to the proceedings in the Stevens County District Court, and it was not a party to either the appeal, or the attempted appeal, therefrom to the Kansas Supreme Court.

In summary, in proceedings before the Kansas Supreme Court, review of which is sought here, the appellant was a party to Cases 41,515 and 41,555, and Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated) and to no other cases. In each of the cases to which the appellant was a party, the judgment of the Kansas Supreme Court is based upon a nonfederal ground adequate in itself to sustain the disposition made by that court.

ARGUMENT

The Judgments of the Kansas Supreme Court Rest upon Adequate Nonfederal Grounds, and No Federal Question Was Properly Raised

This Court has repeatedly held that it lacks jurisdiction to review a state court's decision based upon an independent state ground sufficient to support its judgment. A case such as this, as this Court has previously stated, "is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). Decisions acknowledging this rule, in addition to those cited in the *Muller* case, include:

Cramp v. *Board of Public Instruction of Orange County, Florida*, 368 U.S. 278, 281 (1961).

Black v. *Cutter Laboratories*, 351 U.S. 292 (1956).

Stembridge v. *State of Georgia*, 343 U.S. 541 (1952).

Radio Station WOW, Inc., v. *Johnson*, 326 U.S. 120, 129 (1945).

Holley v. *Lawrence*, 317 U.S. 518 (1943).

Moreover, this Court declines to assume jurisdiction over an appeal from the judgment of a state court where it does not appear upon which of two grounds, one federal and one nonfederal, the judgment rests. *Lynch* v. *People of New York, ex rel. Pierson*, 293 U.S. 52 (1934).

Appellant seeks review by this Court of a judgment entered by the Kansas Supreme Court in four cases (Cases 41,515, 41,516, 41,555 and 41,556). It was a party to only two of such cases (Cases 41,515 and 41,555) each of which was decided by the Kansas Supreme Court on manifestly nonfederal grounds:

Kansas Supreme Court Case 41,515

1. Failure to file timely petitions for rehearing with the Kansas Commission as required by state law.

2. The Kansas Commission's general order operates prospectively and is not subject to judicial review by Kansas courts until implemented by the Commission.

3. The trial court (District Court of Finney County, Kansas) substituted its judgment for that of the Kansas Commission, contrary to the statutory authority granted to such court.

4. The trial court failed to discharge its statutory duty to make findings of fact and conclusions of law when requested to do so by a party.

Kansas Supreme Court Case 41,555

1. The trial court (District Court of Finney County, Kansas) lacked jurisdiction to review the Kansas Commission's orders covered by Case 41,555 because petitions for judicial review of such orders were filed first in the District Court of Stevens County, Kansas.

2. The trial court substituted its judgment for that of the Kansas Commission, contrary to the statutory authority granted to such court.

3. The trial court failed to discharge its statutory duty to make findings of fact and conclusions of law when requested to do so by a party.

Under the law of the State of Kansas, the orders of the Commission are presumed to be valid.[2] They remain in force until set aside by a district court in the manner provided by statute. As indicated by the Kansas Supreme Court in the present case, a Kansas district court has no authority to review the Kansas Commission's orders except to the extent permitted by statute (Jurisdictional Statement A22). The Finney County District Court not only exceeded its statutory authority, erroneously substituting its judgment for that of the Commission, it also failed to discharge its statutorily imposed duty to make findings of fact and conclusions of law. Therefore, because the Finney County District Court departed from the procedures for judicial review established by Kansas statutes, its judgment was reversed. As a consequence, the Kansas Commission's orders remain in effect. Precisely the same errors committed by the Finney County District Court in the present case were committed by the trial court in *Cities of McPherson* v. *State Corporation Commission*, 174 Kan.

2. *Bennett* v. *State Corporation Commission*, 157 Kan. 589, 142 P.2d 810, 815 (1943).

407, 257 P.2d 123 (1953). The Kansas Supreme Court, noting the similarity of the statutory judicial review provisions involved in both cases (Jurisdictional Statement A22), terminated the litigation in each of them by reversal of the trial courts' judgments.

In addition, appellant requests this Court to review a judgment entered by the Kansas Supreme Court in five cases (Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated) and 42,038). Appellant was not a party to Kansas Supreme Court Case 42,038 and, accordingly, can raise no issue in this Court respecting that proceeding. Appellant was a party to Kansas Supreme Court Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated), but those proceedings were decided by the Kansas Supreme Court on the unmistakably nonfederal ground that the trial court (District Court of Finney County, Kansas) lacked jurisdiction to review the Kansas Commission's orders covered by such Consolidated Cases because petitions for judicial review of such orders were filed first in the District Court of Stevens County, Kansas.

SUMMARY

Kansas Supreme Court Case		Reason for Dismissal of These Appeals
41,515		Trial court's judgment reversed on nonfederal grounds.
41,516		Appellant not a party.
41,555		Trial court's judgment reversed on nonfederal grounds.
41,556		Appellant not a party.
42,175	Consolidated	Trial court's judgment re-
42,176		

42,185)	versed on nonfederal
42,230)	grounds.
42,038	Appellant not a party.

The State Corporation Commission of the State of Kansas, Not Private Pipe Line Companies, Should Determine the Amount of Natural Gas Which May Be Produced from the Kansas Hugoton Gas Field

The merits of this appeal present only the nonfederal question of whether a majority of the pipe line companies or the Kansas Commission may control the amount of gas which lawfully may be produced from the Kansas Hugoton gas field. Procedural deficiencies previously discussed are dispositive of this appeal. Nevertheless, to dispel any impression that the appellant may be deprived of the opportunity to assert a meritorious case only because of procedural deficiencies, we desire to focus attention upon the issue on the merits and rescue it from the distortion to which it has been subjected by the appellant in its attempt to convert a purely local question into a federal-state conflict.

The litigation in its entirety involves the validity of producing allowables, *i.e.*, the amount of gas which individual wells are permitted to produce in a given period of time. It would be difficult to conceive of something more squarely within the function of production, which, under the "production and gathering" exclusion of the Natural Gas Act, is reserved for regulation by the states (15 U.S.C., §717(b), Jurisdictional Statement 8).

Apart from this rather obvious disposition of appellant's basic contention that the jurisdiction of the Federal Power Commission has been invaded, we call attention to the fact that the true issue raised by appellant is not whether the Kansas Commission or the Federal Power

Commission is the agency empowered to set gas well allowables, but whether the Kansas Commission or the pipe line companies should have actual control of the allowables.

There were three sides to this litigation in the state court. The appellant attacked the Kansas Commission's orders, contending that the Commission was required to deduct underages from, and add overages to, the amount required to satisfy market demand.[3] This has been characterized as the historic method of computing allowables. If this was done the market demand determination had no ultimate effect on allowables because past runs controlled current allowables. Panhandle and the Royalty Owners attacked the orders on the grounds that the actual market demand, as shown by the evidence, vastly exceeded the nominations (estimates of amounts of gas to be purchased) filed by the pipe line companies and that the Commission had no right to let a majority in interest of the pipe line companies determine allowables, either by actual purchases (as was the case if underages were subtracted and overages added each month) or by nominations. The Commission defended its orders but objected to having to defend the same order in more than one court.

The Commission sometimes accepted the nominations as the market demand and sometimes increased them in inconsequential amounts, but no longer deducted underages or added overages for the previous month. The District Court of Finney County in the early cases (Nos.

3. Underages are amounts of gas which could have been produced under prior orders of the Commission, but were not taken by the pipe line companies. Overages are amounts of gas which the pipe line companies have taken in excess of quantities authorized by prior orders of the Commission.

41,515, 41,516, 41,555 and 41,556) rendered a judgment setting aside the allowables in so far as they exceeded what they would have been if the Commission had followed the historic method.

The second group of cases (Nos. 42,175, 42,176, 42,185 and 42,230 (Consolidated) and 42,038) involved the same issues but arose under an amended Kansas statute. In these cases the Stevens County District Court found that the Commission was not authorized or required to follow the historic method, and the Finney County District Court, in effect, changed its mind and reached the same conclusion. Both courts rejected Panhandle's and the Royalty Owners' contentions that the evidence required a market demand determination substantially in excess of the nominations.

Apart from its conclusions on the procedural questions previously discussed, the Kansas Supreme Court held: (1) The Commission was neither authorized nor required to follow the historic method of deducting underages; (2) Market demand is a question of fact to be determined by the Commission from all of the available evidence, and, although the Commission's market demand determination barely exceeded the total of the nominations, Panhandle and the Royalty Owners had failed to establish that the determination was arbitrary or unreasonable. This second holding is not before this Court because Panhandle and the Royalty Owners have not appealed. Panhandle's decision in this respect is the product of a practical realization that it is more important that the litigation be terminated than that the allowables for seven years be recalculated on the basis of the full market demand. The first holding is all that is left in the case. Certainly, the question of whether the Kansas

Statute directs or permits the Kansas Commission to deduct underages is a question of Kansas law.

In a companion case (No. 140), the appellant, Kansas-Nebraska Natural Gas Compny, Inc., has been candid enough to acknowledge that "At this point in time, the power of the State of Kansas to regulate by limiting the production of natural gas from common sources of supply within the state in order to prevent waste of a valuable resource and to protect the correlative rights of owners of interests in such production is no longer questioned. (*Bandini Petroleum Co.* v. *California Superior Ct.*, (1931) 284 U.S. 8, 76 L. Ed. 136, 52 S. Ct. 103)." (No. 140, Jurisdictional Statement 26).

In none of the related appeals (Nos. 75, 83 and 140) do the appellants complain of the setting of allowables by the Kansas Commission—providing that the Commission establishes allowables according to the so-called historic method. In fact, this is the totality of the complaint, that the Commission departed from the historic method. Reduced to fundamentals, this method was a procedure whereby the Kansas Commission was limited to performing the mechanical function of a calculating machine, using data furnished by the pipe line companies. Thus the pipe line companies—not the Kansas Commission—controlled allowables by (1) their estimates and (2) the quantities of gas actually taken.

Although in some cases the market demand determined by the Commission after it abandoned the historic method was in excess of the estimates, this was not burdensome to the appellant. Allowables do not compel the taking of any gas, rather they are permissive and authorize equitable production from each well in a common source of supply.

Appellant complains that in some instances its gas purchase contracts have "take-or-pay" clauses which require that it take the full allowable or pay for it. Surely the type of contract appellant elects to enter into cannot convert a matter of purely local concern into a matter of federal concern. Any adverse effect of take-or-pay clauses could come about as easily through operation of the historic method (if other companies estimated substantially higher than appellant) or through allowables which might have been established by the Federal Power Commission if that were its function.

The fact is that the appellant has not been hurt by the allowables approved by the Kansas Supreme Court. All underages cancelled during times pertinent to this appeal have been or, upon application by the party concerned, will be reinstated under the procedure established by the Commission.[4] Accordingly, the Kansas Commission's orders have had no adverse effect upon the appellant. Additionally, the State Commission has ordered a moratorium upon cancellation of further underages.[5]

Moreover, as expressly observed by the Kansas Supreme Court (Jurisdictional Statement A33), the Kansas Commission's prior practice of adding cancelled underages to the market demand for gas was not questioned in the Kansas courts. Until added to the market demand, gas constituting the cancelled underage simply remains in the ground. Under the existing practice, no one is deprived of anything. It follows that review of the Kansas Commission's orders by this Court would be inappropriate

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4. No. 83, *Northern Natural Gas Company et al. v. State Corporation Commission of the State of Kansas*, Jurisdictional Statement 29, n. 33.

5. *Ibid.*

until the only practice which could conceivably produce injury has been put into effect and has been properly challenged in the Kansas courts.

Appellant attempts to make this case fit the mold of *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas*, 372 U.S. 84 (1963). Obviously it will not conform, for this Court based that decision squarely on the fact that the order was directed to the pipe line purchaser, saying:

> "The danger of interference with the federal regulatory scheme arises because these orders are *unmistakably and unambiguously directed at purchasers* who take gas in Kansas for resale after transportation in interstate commerce. In effect, these orders shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the State, cf. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340—*a task which would otherwise presumably be the State Commission's.* * * *" (372 U.S. at 92; emphasis supplied.)

Here the Kansas Commission has undertaken that task and has directed its orders to producers, not purchasers for resale after transportation in interstate commerce. Of course, these orders may have some residual effect on interstate pipe line companies, as would any other conservation order or safety regulation directed to the producer. This, however, does not destroy the essentially local character of these conservation acts of the Kansas Commission.

The statute of which appellant complains says no more than that the Commission in determining consumptive demand may consider relevant evidence either within or without the state. Though the appellant has tortured

the issue in an attempt to make it fit the form of a federal question, the case stripped bare is nothing more than a question of whether a majority of the pipe line companies may control allowables to suit their private purposes or whether the Kansas Commission may set allowables based upon reasonable evidence. Surely this issue, premised upon appellant's contention that a state court cannot hear evidence of facts which exist outside of its territorial jurisdiction, presents no substantial question, federal or otherwise.

CONCLUSION

Panhandle Eastern Pipe Line Company, appellee, submits that this appeal should be dismissed because the judgments of the Kansas Supreme Court rest on adequate nonfederal grounds, because no federal question was properly raised and because no substantial federal question is presented.

Respectfully submitted,

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August, 1964

APPENDIX A

COLORADO INTERSTATE GAS COMPANY

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, et al.

The following summaries appear in Panhandle Eastern Pipe Line Company's Abstract of the Record in Kansas Supreme Court Cases Nos. 41,555 and 41,556, which Abstract is part of the record in this appeal. References are to pages in such Abstract. The Kansas Commission's order referred to in the first two summaries appears in such Abstract at pages 83-87, and the Kansas Commission's order referred to in the last two summaries appears in such Abstract at pages 100-101.

Petition for Judicial Review—Southwest Kansas Royalty Owners Association

On December 31, 1958, after Petitions by all parties for rehearing had been denied, the Southwest Kansas Royalty Owners Association filed its Petition for a Judicial Review of the Commission's Order determining the six months market demand for gas produced from the Kansas Hugoton Field, which Order has been heretofore set forth.

The Royalty Owners Association filed its Petition for Judicial Review in the District Court of Stevens County, Kansas. It was assigned Case No. 4044. [Page 102]

Petition for Judicial Review—Colorado Interstate Gas Company

On January 7th, 1959, Colorado Interstate Gas Company filed its Petition for a Judicial Review of the Commission's Order determining the six months market demand for gas produced from the Kansas Hugoton Field, in the District Court of Finney County, Kansas. It was assigned Case No. 10,582. [Pages 116-117]

Petition for Judicial Review—Southwest Kansas Royalty Owners Association

On December 31, 1958, after Petitions for Rehearings by all parties had been denied, the Southwest Kansas Royalty Owners Association filed its Petition for a Judicial Review of the Commission's Order determining the October, 1958, Allowables for the Kansas Hugoton Field.

The Royalty Owners Association filed its Petition for Judicial Review in the District Court of Stevens County, Kansas. It was assigned Case No. 4045. [Page 102]

Petition for Judicial Review—Colorado Interstate Gas Company

On January 7th, 1959, Colorado Interstate Gas Company filed its Petition for a Judicial Review of the Commission's Order determining the October, 1958, allowables for gas produced from the Kansas Hugoton Field, in the District Court of Finney County, Kansas. It was assigned Case No. 10,581. [Page 104]

APPENDIX B

IN THE DISTRICT COURT OF STEVENS COUNTY, KANSAS

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, Petitioners, vs. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Respondent, NORTHERN NATURAL GAS COMPANY, Intervenor.	Cases Numbered: 4044, 4045, 4046, 4047, 4048, and 4049.

Mr. Dale M. Stucky
901 First National Bank Bldg.
Wichita 2, Kansas

Mr. A. E. Kramer
Hugoton, Kansas

Mr. C. C. Linley
Liberal, Kansas

Mr. Chas. Vance
Liberal, Kansas

Mr. Clyde E. Milligan
Kansas Corporation Commission
Topeka, Kansas

Mr. Mark H. Adams
202 Board of Trade Bldg.
Wichita, Kansas

Order of Continuance

The above cases are before this court on:

1. Motion by Intervenor to dismiss for lack of jurisdiction; and
2. Judicial Review of Orders made by The State Corporation Commission of the State of Kansas.

Since the District Court of Finney County, Kansas has taken jurisdiction of the identical matters at issue in the above cases, as well as former companion matters, I can see no good that could result from any judgment by this court until a final disposition has been made of the identical matters in the District Court of Finney County, Kansas.

If this court makes the same findings and renders the same judgment, as those made and to be made by the District Court of Finney County, Kansas, then nothing beneficial is accomplished.

Findings and judgments by this court different or contrary to those made by the District Court of Finney County, Kansas would result in two appeals to the Supreme Court on the same points.

Such results would not be beneficial to the litigating parties and would be harmful to the prestige and dignity of the judiciary of Kansas.

Therefore, this court, on its own motion, continues the above cases for decision until disposition has been made of the identical matters in the District Court of Finney County, Kansas or until something further arises that is not at this time foreseen by this court.

/s/ L. L. Morgan

Judge L. L. Morgan
District Judge

SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
AUG 10 1964
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1964

No. 75

COLORADO INTERSTATE GAS COMPANY,
a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JOINT MOTION TO DISMISS OF THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

and

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION

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Topeka, Kansas,
RICHARD C. BYRD, *Special Counsel for State Corporation Commission of Kansas*,
*DALE M. STUCKY, *Counsel for Southwest Kansas Royalty Owners Association*.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 75

COLORADO INTERSTATE GAS COMPANY,
a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

Pursuant to Revised Rule 16 of this Court, Appellees State Corporation Commission of the State of Kansas[1] and Southwest Kansas Royalty Owners Association[2] move to dismiss these appeals because the judgments of the Kansas Supreme Court rest on adequate nonfederal bases and no substantial federal question is presented.

1. Hereinafter called Commission.
2. Hereinafter called Landowners.

OPINIONS BELOW

The opinions of the Kansas Supreme Court are reported at 192 Kan. 1, 386 P.2d 266[3] and 192 Kan. 29, 386 P.2d 288[4].

JURISDICTION

Appellant attempts to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

Whether the judgments of the Kansas Supreme Court rest on adequate nonfederal grounds and whether any substantial federal question is presented.

STATEMENT OF THE CASE

These appeals involve gas proration orders issued by the Commission for the Kansas Hugoton Field. The proration orders are addressed to and directed solely to producers—not purchasers—and fix the maximum amount of gas that can be produced from each well. They are permissive orders and do not require any producer to produce any gas.

Each opinion of the Kansas Supreme Court disposed of several appeals, each of which involved several separate proceedings in the District Courts of Finney and

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3. Hereinafter called first opinion. Reproduced at Appendix A to Jurisdictional Statement.

4. Hereinafter called second opinion. Reproduced at Appendix B to Jurisdictional Statement.

Stevens Counties, Kansas. It will be necessary to outline the various proration orders involved in each proceeding in each District Court and the various judgments of the District Courts involved in the various appeals to the Kansas Supreme Court.

A. The First Opinion of the Kansas Supreme Court.

The first opinion of the Kansas Supreme Court disposed of Cases Nos. 41,515, 41,516, 41,555 and 41,556. Appellant has appealed these cases (Appellant's Notices of Appeal to Supreme Court of the United States).

1. Cases Nos. 41,516 and 41,556.

Appellant was not a party to these cases in the Trial Court and did not appeal the cases to the Supreme Court of Kansas (Nos. 41,515 and 41,516, Abstract of the Record, 351-3; Nos. 41,555 and 41,556, Appellant's Abstract of the Record, 178-80).

2. Cases Nos. 41,515 and 41,555.

Appellant initiated these cases in the Finney County Court to review various proration orders and a general order. The Trial Court set aside the general order and set aside the Commission's proration orders and substituted its own proration orders (Nos. 41,515 and 41,516, Abstract of the Record, 337-8; Nos. 41,555 and 41,556, Appellants' Abstract of the Record, 181).

The Supreme Court of Kansas reversed the judgments of the Finney County Court because, among other grounds:

> (a) The Trial Court did not have jurisdiction to review the proration orders issued prior to November, 1957, because Appellant had not filed petitions for rehearing with the Commission, as required

by the Kansas Judicial Review Act[5] (192 Kan. at 10-2, 386 P.2d at 275-6; Appendix A to Jurisdictional Statement, A 14-7).

(b) The Trial Court did not have jurisdiction to review the general order because the attempted review proceeding was premature under the Kansas Judicial Review Act[6] (192 Kan. at 12-4, 386 P.2d at 276-7; Appendix A to Jurisdictional Statement, A 18-9).

(c) As to all proration orders, the Trial Court exceeded its authority under the Kansas Judicial Review Act,[7] by promulgating its own proration orders, rather than judicially reviewing the Commission's proration orders (192 Kan. at 14-6, 386 P.2d at 277-8; Appendix A to Jurisdictional Statement, A 19-22).

(d) The Trial Court erred in failing to make findings of fact and conclusions of law as required by G.S. Kan., 60-2921 (192 Kan. at 16-7, 386 P.2d at 278-9; Appendix A to Jurisdictional Statement, A 23-4).

B. The Second Opinion of the Kansas Supreme Court.

The second opinion of the Kansas Supreme Court disposed of Cases Nos. 42,175, 42,176, 42,185 and 42,230 (consolidated by the Kansas Supreme Court)[8] and 42,038. Appellant has appealed these cases (Appellant's Notices of Appeal).

1. Consolidated Cases.

These cases were initiated by Appellant and others in the Finney County Court to review various proration

5. G.S. Kan., 55-606.

6. *Ibid.*

7. *Ibid.*

8. Hereinafter called consolidated cases.

orders. The Kansas Supreme Court held that the Finney County Court lacked jurisdiction, under the Kansas Judicial Review Act,[9] to review such proration orders and reversed with instructions to dismiss (192 Kan. at 32-5, 386 P.2d at 290-2; Appendix B to Jurisdictional Statement, A 49-51).

2. Case No. 42,038.

The Landowners initiated this case in the Stevens County Court to review the same proration orders involved in the consolidated cases. Prior to trial, the Stevens County Court was informed that Appellant had, after the commencement of the Stevens County proceedings, filed petitions to review the same proration orders in the Finney County Court. The Stevens County Court ordered Appellant to present its grievances concerning such proration orders to the Stevens County Court (No. 42,038, Abstract and Counter Abstract of Southwest Kansas Royalty Owners Association, 239-41).

Appellant refused to follow the Court's order. It did not participate in this case in the Trial Court and did not appeal such judgment to the Kansas Supreme Court (192 Kan. 29, 386 P.2d 288; Appendix B to Jurisdictional Statement A 43).

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9. G.S. Kan., 55-606.

ARGUMENT

I. The Judgments of the Kansas Supreme Court Rest on Adequate Nonfederal Bases.

Appellant was not a party to Cases Nos. 41,516, 41,556 and 42,038 and did not appeal the judgments of the Trial Court to the Kansas Supreme Court. It has no standing to appeal such cases to this Court.

In Cases Nos. 41,515, 41,516 and the consolidated cases, the Supreme Court of Kansas held that, under the Kansas Judicial Review Act,[10] the Trial Court did not have jurisdiction. This is clearly a nonfederal ground.

The Kansas Supreme Court also held, in Cases Nos. 41,515, 41,516, 41,555 and 41,556, that the Trial Court exceeded its authority, under the Kansas Judicial Review Act,[11] when it promulgated proration orders rather than judicially reviewing the Commission's proration orders, and erred in not making findings of fact and conclusions of law, as required by Kansas law.[12] Again, clear-cut nonfederal grounds.

This Court does not review state court judgments based on adequate nonfederal grounds:

> "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds [Citations omitted]" *Fay* v. *Noia*, 332 U.S. 391, 428.

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10. G.S. Kan., 55-606.

11. *Ibid.*

12. G.S. Kan., 60-2921.

Other cases recognizing this rule are *Buck* v. *California*, 343 U.S. 99; *Nickel* v. *Cole*, 256 U.S. 222, 225; and cases cited therein.

The judgments of the Supreme Court of Kansas are based on adequate nonfederal grounds that the Trial Court lacked jurisdiction, exceeded its statutory authority and failed to follow state trial procedure. Any of these nonfederal grounds are sufficient to sustain the judgments of the Kansas Supreme Court. Appellant's appeals should be dismissed.

II. These Proration Orders Do Not Violate the Federal Constitution or the Natural Gas Act.

The above discussion demonstrates that no federal questions are properly presented and these appeals should be disposed of accordingly. However, due to the fact that imaginative counsel, aided in no small part by a voluminous record, has distorted this appeal to the point that the Kansas Supreme Court and the Commission have been accused of engaging in some sort of unlawful scheme, we feel compelled to briefly mention the merits of these appeals.

Appellant concedes that a state can prorate gas when necessary to prevent waste or protect correlative rights. It contends, however, that there was no evidence that these proration orders were necessary to prevent waste or protect correlative rights and, therefore, they violate federal law.

The record before the Kansas Commission contains extensive expert testimony on the technical phase of waste prevention and protecting correlative rights. The record is conclusive that the proration orders involved in these proceedings were necessary and designed to prevent phys-

ical waste of natural gas and to protect the correlative rights of the landowners and lessees.

It was evident from this investigation that unless the gas from the Hugoton Field was produced at a rate in excess of the rate it was then being produced 70% to 80% of the 4,000 wells in the field would ultimately fail due to pipe corrosion. The corrosion of pipe would permit otherwise recoverable gas to be lost. Pipe corrosion permitted the encroachment of water into the producing formation causing permanent damage to the reservoir. Wells that failed due to corrosion would ultimately have to be replaced with expensive new wells or the gas would be lost.[13]

The instances of pipe failure due to corrosion greatly increased with the age of the wells. To reduce pipe failures and the resulting loss of gas the field had to be produced at a more reasonable and realistic rate. The evidence clearly showed that the slow rate of production and the resulting loss of gas due to pipe corrosion resulted from the methods followed by the Kansas Commission in determining the market demand for the field and in calculating the allowables for the wells. If waste is caused by unwarranted limitation of production the correction of such a limitation is certainly a waste preyention measure.

Appellant's contention that these proration orders violate the Commerce Clause to the Federal Constitution was rejected by this Court in *Cities Service Gas Company v. Peerless Oil & Gas Co.*, 340 U.S. 179. There the Okla-

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13. Nos. 41,515 and 41,516, Abstract of the Record, 71, 77-8, 84-6, 90, 92-3, 98, 272; Nos. 41,555 and 41,556, Appellant's Abstract of the Record 24 41; No. 42,038, Abstract and Counter Abstract of Southwest Kansas Royalty Owners Association 78, 101

homa Commission ordered an interstate purchaser to buy gas and fixed the price. Cities Service Gas Company made the same constitutional argument that Appellant now advances.

> This Court disposed of the contention in short order: "It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce." 340 U.S. at 186.

We have some difficulty understanding Appellant's contention that these proration orders invade the jurisdiction of the Federal Power Commission. Appellant complains that such orders are invalid because the Commission did not find the market demand to be equal to the nominations of the pipelines and, therefore, the orders violate federal law. Appellant, however, engaged in the flippant practice of nominating "0" Mcf.[14] The Commission refused to believe such "0" nominations and considered other evidence in determining the market demand. Surely, this did not violate federal law.

We do not think that Appellant seriously suggests that the overwhelmingly complicated task of prorating gas for all states should be turned over to the Federal Power Commission.

The Federal Power Commission recognizes that it has no such authority:

> "[petitioner's] contentions in effect are that this Commission should perform the functions of prorating takes and adjusting correlative private rights of producers within a field; matters which it seems to us should be decided by the Commonwealth of Ken-

14. Nos. 41,515 and 41,516, Abstract of the Record 104, 305-6.

tucky . . ." *Reserve Oil and Gas Co. et al.*, Docket Nos. G-4720, *et al.*, issued April 2, 1964.[15]

This position is in accord with the decisions of this Court.

In *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, this Court noted that:

> "The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the state legislatures, in the interest of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas" (Footnotes omitted) 337 U.S. at 509-13.

In the footnote to the above quotation, this Court said "See, for example, Kansas Gen. Stat. C. 55, §§ 701-713 . . ."[16]

This Court also made it clear that the states retained this power in *Northern Natural Gas Company v. State Corporation Commission*, 372 U.S. 84, when it noted that:

> "The State does not, however, appear to be without alternative means of checking waste and disproportionate or discriminatory taking" 372 U.S. at 94.

In the footnote to this quotation, this Court noted that "the availability of regulatory alternatives, particularly in the form of proration and similar orders directed at producers, has been much discussed."[17]

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15. Rehearing has since been granted on other issues.

16. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 n. 17.

17. *Northern Natural Gas Company v. State Corporation Commission*, 372 U.S. 84, 94 n. 12.

Apparently, Appellant contends that the Federal Power Commission must be given the power to prorate gas because the Kansas proration orders will cause conflicts to arise among the state proration agencies and with the Federal Power Commission. Not only does this argument do violence to the very plain and well known Congressional intent that the states should retain their power to prorate gas,[18] but it also overlooks the fact that the orders here under review were issued more than eight (8) years ago. There has been no conflict among the states or with the Federal Power Commission. There has been no interference with interstate sales or transportation of gas.

The Congressional mandate that the states should retain control over the production of natural gas has been recognized by the Court on many occasions. The heart and soul of such regulation are proration orders. If, as Appellant suggests, the states do not have this power, there is no area left for state regulation. To say the least, this would do violence to the very clear statement that the Natural Gas Act does not cover "the production . . . of natural gas".[19]

This appeal does not present any substantial federal question and should be dismissed.

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18. Many states were prorating gas when the Natural Gas Act was passed (See, Murphy, Conservation of Oil & Gas, A Legal History, 1948) and, prior to passage, Congress was assured that the Act "takes no authority from State Commissions as it is so drawn as to complement and in no manner usurp State regulatory authority" (H.R. Rep. No. 709, 75th Cong., 1st Sess., p. 2).

19. 15 U.S.C. §717b.

CONCLUSION

The judgments of the Kansas Supreme Court rest on adequate nonfederal grounds and do not involve a substantial federal question.

Appellees' motion should be granted and the appeals dismissed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

COLORADO INTERSTATE GAS COMPANY,
a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS

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No. 75

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

COLORADO INTERSTATE GAS COMPANY,
a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS

Appellees, Kansas State Corporation Commission and Southwest Kansas Royalty Owners Association, have filed a joint motion to dismiss. The other Appellee, Panhandle Eastern Pipe Line Company, has filed a separate motion to dismiss. The motions are similar and make essentially the same arguments. We submit that they misinterpret the questions involved and do not show any lack of jurisdiction on the part of this Court.

I.

THE SUBSTANTIAL FEDERAL QUESTIONS PRESENTED IN OUR JURISDICTIONAL STATEMENT WERE PROPERLY RAISED AND WERE EXPRESSLY DETERMINED BY THE KANSAS SUPREME COURT.

The pertinent statute, 28 *U.S.C.* 1257, provides for the jurisdiction of this Court to review decisions of state courts where there is drawn in question the validity of a state statute on the ground of its being repugnant to the constitution and laws of the United States and the decision is in favor of its validity. Plainly it is the decision of the Kansas Supreme Court which upheld as valid orders having the status of state statutes as against our federal attack on such orders that is in issue on these appeals and which this Court has jurisdiction to, and should, review.

One cannot escape the conclusion that the Kansas Supreme Court treated the federal questions which we present here as having been properly raised and in its opinion expressly passed upon such questions.* Thus, in the opinion of the Kansas Supreme Court at A-36, the Court stated,

> "The appellees contend that the orders of the Commission violate the commerce clause of the federal constitution and the Natural Gas Act."

After discussion of these issues, the Kansas Supreme Court held the orders valid as within legitimate state area pursuant to the exemption contained in the Natural Gas Act, stating (A-39).

*Such decisions are contained in Appendix 1 and Appendix 2 in our Jurisdictional Statement, running from pages A-1 through A-57. References herein to such decisions of the Kansas Supreme Court will be to the pertinent pages in such appendices.

"The regulation of the production of gas was clearly left within the jurisdiction of the states."

Therefore, when the Kansas Supreme Court (A-42) reversed the judgments of the trial court and instructed such court to dismiss the petitions for review challenging orders through October, 1957, and further instructed the trial court to approve the allowable orders from November, 1957, through January, 1959, it expressly passed upon the federal questions here raised. It is, therefore, perfectly clear that the Kansas Supreme Court expressly considered the federal questions involved in these appeals insofar as they pertain to Kansas Corporation Commission orders from November of 1957 through January of 1959. The fact that the orders prior to November of 1957 were not considered is of no moment. The same questions were before the court beginning in November, 1957, and extending through January, 1959. Such questions here presented were recognized by the Kansas Supreme Court and were determined by that Court.* It is to review that determination that these appeals were taken. They fall expressly within the jurisdiction of this Court.

It is true that the Kansas Supreme Court also considered procedural questions. However, it is just as clear that such procedural questions in the view of the Kansas Su-

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*Such court held (A-25),

"Certain monthly allowable orders (November, 1957, through January, 1958) issued by the Commission before its report and order, effective February 1, 1958, was entered, were before the district court for review, and are before this court on appeal. However, as the Commission followed the same formula in determining these monthly allowables as it did in determining the monthly allowables after it entered its report and order, it would serve no useful purpose to extend further this lengthy opinion by a separate discussion of them. We will consider the market demand determinations and the allowables made for the months beginning March, 1958, and extending through January, 1959."

preme Court did not detract one whit from its recognition and treatment of the federal questions presented. Thus the Kansas Supreme Court observed at A-14

> "Certain procedural questions have been raised which will first be given attention. Although the decision on the merits may render their determinations unnecessary, it is advisable that the proper procedure be outlined in order that the courts shall not again be faced with the chaotic situation that exists here."

The situation is the same under the amended Kansas statute where the Kansas Supreme Court wrote a separate opinion, beginning at page 43 of the Appendix to our Jurisdictional Statement. The Kansas Supreme Court observed at A-46,

> "The questions presented by these appeals were determined in *Colorado Interstate Gas Co. v. State Corporation Comm.*, (41,515), 192 Kan. .... P.2d ....., insofar as they challenge the Commission's orders for the reason that they are not supported by a substantial competent evidence; they violate the provisions of the Gas Conservation Act or the Commission's basic order; they constitute an interference with interstate commerce; they invade the province of the Federal Power Commission under the Natural Gas Act, or they violate the due process clause of the United States Constitution or impair the obligation of contracts. Undue repetition will be avoided if we incorporate that opinion here by reference as determinative of the issues mentioned. We do so."

It is obvious, therefore, that the Kansas Supreme Court considered the federal questions raised as set forth in our Jurisdictional Statement and determined such questions aside from any procedural problems. We seek review of such determination on the substantive federal questions so recognized and determined. The Appellees would like to

duck such federal questions and therefore contend that the decisions below rest on an adequate non-federal ground. The trouble with such contention is that such view was not shared by the Kansas Supreme Court. That Court recognized the questions presented in our Jurisdictional Statement, treated them in all respects as being properly raised and rendered its decision thereon.* We submit that such decision is incorrect insofar as it pertains to the merits and therefore seek review by this Court. The jurisdiction of this Court is to review the determinations of such questions by the Kansas Supreme Court. They were there so determined and are subject to review under the jurisdiction granted this Court.

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*The rule is as laid down by this Court in *Charleston Fed. Sav. & Loan Association* v. *Alderson*, 324 U.S. 182, 185-6, 65 S. Ct. 624, 89 L. Ed. 857, 861 (1945),

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

To the same effect see *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U.S. 192, 197, 65 S. Ct. 226, 89 L. Ed. 173, 180 (1944).

II.

IN ORDER TO EXECUTE THE AVOWED PURPOSE OF CAPTURING FOR THE KANSAS HUGOTON FIELD A GREATER PORTION OF THE INTERSTATE MARKET FOR GAS, THE KANSAS COMMISSION EXCEEDED ITS AUTHORITY.

The Kansas Commission Did Not Pro Rate the Actual Market for Kansas Hugoton Gas. Rather It Set the Portion of the Interstate Market for Gas Which It Conceived the Pipeline Purchasers Should Allocate to Kansas Hugoton from Their Interstate Markets. This Is Not Concerned with Production and Gathering Within the Hugoton Field. Rather It Is a Reaching Out into the Federal Sphere under the Natural Gas Act, the Sale and Transportation of Gas in Interstate Commerce. It Affects the Interstate Pipeline Purchasers by Disrupting Purchasing Patterns, Jeopardizing Reserves, and Necessarily Affects the Cost of Gas.

These proceedings were begun before the Kansas State Corporation Commission (by notices directed to the pipe line purchasers) to consider the market demand in the Kansas Hugoton Field and (by orders directed to the pipe line purchasers) to study the factual data submitted under order concerning the pipe line purchasers' interstate markets for gas. The Commission, after hearings pursuant to such notices and orders (issued in March of 1956) entered a general order effective February 1, 1958, stating that it would determine market demand after consideration of the interstate markets of the pipe line purchasers in the Kansas Hugoton Field and would pro rate to such field such market demand so determined without correction for the

actual runs of gas—the actual amount of gas marketed from the Kansas Hugoton Field. This is shown by the Commission's order contained in the Appendix to our Jurisdictional Statement from page A-90 through page A-101. In a separately concurring opinion (A-104) the Chairman stated that the Commission was committed to setting artificially high allowables at a figure which eventually would permit equalization of pressures in the Hugoton Field between Kansas and Oklahoma and which would permit a planned depletion of the Kansas Hugoton Field in some 30 years. The Chairman recognized the coercion on the pipe line purchasers by the underages which developed under the Commission's practice of setting such artificially high allowables far in excess of the actual gas marketed, with the inevitable loss of reserves to the pipe line purchasers who could not run such artificially high allowables.*

Commissioner Richard C. Byrd also specially concurred (A-105-107), indicating clearly his view that there should be a planned depletion of Kansas Hugoton with minimum allowables established, particularly since the pipe line purchasers' markets had increased disproportionately to their takes from Kansas Hugoton.**

The Commission in its report to the Legislature contained in the Appendix to our Jurisdictional Statement at A-138-139, asked for a clearer mandate authorizing it to order a planned depletion of the Kansas Hugoton Field. The Commission, in the Joint Stipulated Abstract with this Appellant, candidly stated that its purpose was to get the

*Note also the Chairman's dissent from the Commission's order for December, 1957 (R. Vol. III, pp. 238-240). For the convenience of the Court we have reproduced this material and it is contained in the Appendix to this brief at App. A1-A2.

**This is the same Richard C. Byrd who now appears in a different hat as special counsel for the Kansas State Corporation Commission.

runs from the Kansas Hugoton Field increased, *i.e.*, to take the action necessary so that more gas would be marketed from such field (R., Vol. 1[2], p. 3.)*

What the Corporation Commission actually did, and is continuing to do, is to set artificially high allowables, making no correction for the actual amount of gas run from the field. It is not limiting production in the generally recognized manner for proration orders to the amount of gas actually marketed and spreading such quantity equitably to all the wells in the pro rated pool. This is graphically illustrated by the growth of underage disclosed in the table in the Appendix to our Jurisdictional Statement at pp. A-124 and A-125. This great accumulation of underage (by March of 1960 over 152 billion cubic feet, and much larger by this date) measures the difference between market demand as determined by the Commission and the actual market for gas from the Kansas Hugoton Field.

It does not help this situation to refer to nominations, to current allowable, to net allowable, or to any other label. The Commission, by setting artificially high allowables (allowables greater than the actual demand for gas) has made available for production in the field a great deal more

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*The orders do affect and are intended to affect the pipe line purchasers, as note the testimony of the Chairman of the Kansas State Corporation Commission on July 21, 1964, before the F.P.C. *In the Matters of Transcontinental Pipeline Company, et al.*, F.P.C. Docket No. G-20464, *et al.*, at p. 5436:

"Q. It is your idea of market demand as against the pipeline company's idea of market demand. That is what it gets down to, isn't it?

"A. Yes, sir.

"Q. And you are trying to tell them that they will have to take what you determine they shall take rather than what they in their judgment determine they should take. That is what it gets down to, isn't it?

"A. That is correct."

gas than can actually be marketed from the field. This Appellant sought during the hearings before the Commission to pinpoint that fact by nominating zero for a proration period. This nomination was sent in, together with an explanatory letter indicating that there was already available for production from the wells connected to this Appellant's system sufficient quantities of unrun gas, i.e., a part of the great accumulated underage, so that any further allowable would only aggravate the situation.* This was no idle gesture on the part of this Appellant nor was it any "flippant" practice as suggested in the joint motion of the Corporation Commission and the Southwest Kansas Royalty Owners Association. It was a very serious attempt by this Appellant to call to the attention of the Commission the results of its practice in setting artificially high allowables, thus making vast quantities of gas available for production which were not produced because such quantities could not be marketed. It sought to call graphically to the attention of the Commission its attempts to capture interstate markets—that the Commission was acting outside the ambit of state authority.

It is suggested in support of some of the motions to dismiss that there has been no retaliatory action from other states during the eight years that this matter has been pending. Of course during all but the last few months the orders of the Commission have been stayed. Doubtlessly other gas producing states are awaiting the outcome of this case.

It is suggested by Appellees that this Court should decline to note probable jurisdiction since the Kansas Com-

*The Commission was advised and understood the position of Appellant as the Record discloses (R. Vol. III, p. 280), which we have reproduced and attached as an appendix to this brief at App. A5.

mission has entered a moratorium as to its orders and the accumulated underage arising therefrom. This is in the nature of an admission and avoidance. But a moratorium does not avoid. It does not bring the tampering with interstate markets within the production and gathering exception to the Natural Gas Act. By entry of such moratorium order the Commission is actually recognizing that its orders under which the great underages developed were not proration orders. If the Commission had entered proration orders, these indigestible underages would not exist.

Once before the State Corporation Commission, joined by the Southwest Kansas Royalty Owners Association, sought to convince this Court that it dealt only with the production of gas in the Kansas Hugoton Field and was exempt from the provisions of the Natural Gas Act. As we set forth in our Jurisdictional Statement, this effort was unsuccessful, being met by this Court's decision in *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391, 78 S. Ct. 381, 2 L. Ed. 2d 355 (1958). We submit that history is repeating itself—that again the Commission, joined by the Southwest Kansas Royalty Owners Association, is endeavoring to convince this Court that the setting of the market for the Kansas Hugoton Field, at a share as envisioned to be fair by that group of the interstate market for gas in these United States, is production and exempt under the Natural Gas Act. Obviously the matter of the interstate market for gas is beyond the production and gathering exemption. By its very nature it involves the sale and transportation of gas in interstate commerce; it involves the purchasing patterns of the pipe line purchasers; it involves the cost of gas to the ultimate consumer.

This Court should again speak, and speak plainly, to the Kansas Supreme Court and again adjudicate the invalidity of the contentions made by the State Corporation Commission, joined by its ally, the Southwest Kansas Royalty Owners Association.

III.

THERE IS NO PROCEDURAL MATTER INVOLVED IN THE INSTANT CASES WHICH AFFECTS THE JURISDICTION OF THIS COURT TO REVIEW THE DECISIONS OF THE KANSAS SUPREME COURT.

Appellees assert in their motions to dismiss that there are procedural problems or difficulties which bear on the jurisdiction of this Court to consider the questions presented in our Jurisdictional Statement. We submit that in this they are in error. The basis of their assertion should be examined to disclose such error.

These proceedings began before the State Corporation Commission in March of 1956. The Commission held hearings off and on over a period of almost two years before it determined by its order effective February 1, 1958, how it would proceed in its experimentation in the Kansas Hugoton Field. During such period it entered what it termed "Interim Orders". Whatever the effect of such orders as adjudicated by the Kansas Supreme Court, the parties, during the time the matter was being considered by the State Corporation Commission, considered that such orders were not final and therefore not appealable since the Commission had not yet announced how it would proceed and denominated its orders "Interim Orders".* If such orders

*See statement of the Chairman of the Commission (R. Vol. III, pp. 229-231). We have reproduced the statement in the appendix hereto at App. A4-A5.

are indeed final orders, as the Kansas Supreme Court determined, they may not be reviewable since no petition for rehearing was filed concerning them. This, however, does not mean that the questions presented in the Jurisdictional Statement are not properly presented.

Beginning with November of 1957 and continuing to January of 1959, there were petitions for rehearing timely filed and then petitions for judicial review filed, all in the District Court of Finney County, Kansas, by this Appellant. All interested parties at this point and as to these orders, entered their appearance in that court. There is no possible question concerning the jurisdiction of that court to hear the petitions. As a matter of fact Appellant prevailed in that court. It is true that the Kansas Supreme Court disagreed and reversed, with directions to such court to approve the applicable orders during the period November, 1957 through January, 1959. Note the direction of the Kansas Supreme Court contained in the appendix to our Jurisdictional Statement at A-42.

This determination by the Kansas Supreme Court came after a consideration of the federal questions presented in our Jurisdictional Statement and a determination that such orders were valid as the Kansas Supreme Court construed the federal constitution and the Natural Gas Act. It is to review this decision that we filed the appeal from the first opinion of the Supreme Court of Kansas.*

After the amendment to the Kansas Gas Conservation Act, this Appellant proceeded in exactly the same manner as it had been doing for some years, i.e., filing, first, pe-

*We filed two appeals because the Kansas Legislature amended the Gas Conservation Act. Actually the Supreme Court of Kansas has determined that the Kansas law is the same under the amended Act as it was theretofore.

titions for rehearing, and then petitions for judicial review in the District Court of Finney County, Kansas, these appeals being from the six months' proration order for the period October 1, 1959 through March 31, 1960, and from each of the monthly orders entered pursuant thereto for October through December, 1959, and January through March, 1960.

The Southwest Kansas Royalty Owners Association filed a petition for judicial review after having filed a petition for rehearing in the District Court of Stevens County, Kansas, a few days earlier as to the six months' order and as to the October order. The remaining petitions were all filed on the same day as the petitions of this Appellant, the petitions of the Southwest Kansas Royalty Owners Association in Stevens County and this Appellant's petitions in Finney County. This Appellant never appeared in Stevens County and never was served with any summons to appear in Stevens County. It followed what it conceived to be a practice recognized by the Kansas Supreme Court, of filing its own petition for judicial review in a court of competent jurisdiction. Indeed the Kansas Supreme Court had a few years earlier heard appeals, after petitions for judicial review were filed from two separate counties and made no indication in its decision (where both such appeals were heard together, just as in the instant appeals) that there was anything wrong with such procedure, as note *Kansas-Nebraska Natural Gas Co. v. State Corporation Commission* (37,921 from the Finney County District Court), *Northern Natural Gas Co. v. State Corporation Commission* (37,920 from the Finney County District Court), and *Panhandle Eastern Pipe Line Company v. State Corporation Commission* (37,924 from the Seward County District Court), 169 Kan. 722, 222 P.2d 704 (1950). Additionally Appellant felt (and in this the Kansas Su-

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preme Court has indicated that it was correct) that the same question was presented under the old Kansas Gas Conservation Act as that presented under the new, and that, therefore, the District Court of Finney County, Kansas, where the first petitions for judicial review were filed, was the proper court in which to continue the litigation. There is authority from the Supreme Court of Kansas which would so indicate, as note *City of Hutchinson* v. *Hutchinson Gas Company*, 125 Kan. 346, 264 Pac. 68 (1928).

Appellees assert that, since the Kansas Supreme Court, in considering the procedural aspects for guidance in future actions, determined that Stevens County had jurisdiction and there was no jurisdiction in Finney County, Appellant has no right of appeal. Again, Appellees are in error in such contention: First, because the Kansas Supreme Court has recognized that the problems presented in the various appeals are the same, whether before or after the amendment to the Kansas Gas Conservation Act, and Appellant presented, and obtained a determination of, the federal questions which it asserts in its Jurisdictional Statement in cases heard only in the District Court of Finney County, Kansas; and, second, because state procedure in matters of this kind can not preclude review by this Court.

This Court has frequently indicated that untenable state grounds may not preclude review of federal questions, particularly where rules of state pleading or procedure have been used unreasonably to avoid a decision relative to federal rights. See *Davis* v. *Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 68 L. Ed. 143 145 (1923); and *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 455-458, 78 S. Ct. 1163, 2 L. Ed. 2d 1488, 1495-1497 (1958). As put by Mr. Justice Clark in *Williams* v. *Georgia*, 349 U.S. 375, 399, 75 S. Ct. 814, 99 L. Ed. 1161, 1178 (1955),

"* * * A purported state ground is not independent and adequate in two instances. *First*, where the circumstances give rise to an inference that the state court is guilty of an evasion—an interpretation of state law with the specific intent to deprive a litigant of a federal right. *Second*, where the state law, honestly applied though it may be, and even dictated by the precedents, throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights."

We submit that certainly as to the first appeal before the change in the Kansas Gas Conservation Act, the Kansas Supreme Court met the federal questions presented squarely and did not seek in any way to rest the decision on any state ground. The questions presented in our Jurisdictional Statement as to such first appeal were recognized and determined by the Kansas Supreme Court without any procedural problem whatever, at least for the months from November, 1957, through January, 1959.

It is apparent from the decision of the Kansas Supreme Court that it considered the federal questions involved and set forth in our Jurisdictional Statement as being the same whether under the old or the new Kansas statute. Such federal questions are, therefore, properly presented in our Jurisdictional Statement. The only possible difficulty is the decision of the Kansas Supreme Court that the Finney County District Court had no jurisdiction under the statute as amended since the first two petitions for review were filed in Stevens County and the remaining petitions were simultaneously filed in Finney and Stevens Counties. These procedural difficulties or obstacles should not preclude this Court from consideration of the federal questions which were promptly and

properly raised and which were determined by the Kansas Supreme Court.

This Court should note probable jurisdiction and on the hearing on the merits determine that the questions presented in our Jurisdictional Statement are federal questions and that the orders of the Kansas State Corporation Commission are beyond the ambit of state authority.

Respectfully submitted,

LEWIS M. POE, JR.,
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JAMES LAWRENCE WHITE,
Denver, Colorado
MALCOLM MILLER,
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APPENDIX A

See page 7 of Brief.

Dissenting Opinion of the Chairman of the State Corporation Commission to the Commission's Order for December, 1957. (R. Vol. III, pp. 238-240)

For the reasons set forth in my special concurring opinion in Dockets 51,342-C, 53,042-C, 54,220-C and 51,488-C, issued January 22, 1958, and made effective February 1, 1958, I feel that the action we are now taking on the 5th day of February, 1958, in regard to the belated December allowable for the Hugoton Field, is unrealistic and is not effective proration.

This December allowable and proration order for the Hugoton Field evidences an intention on the part of this commission to continue down the road of setting artificially high allowables for the purpose of forcing more speedy depletion of the field. If this is what the majority of the industry wants, I have no vehement objections, but I cannot overlook the fact that this Commission is established by statute as a state conservation commission and I fear that it has no jurisdiction to take sides with part of the industry as against another part to promote such a social and economic program.

This December current allowable is equal to and the December net allowable is grossly in excess of what was produced and sold from the Hugoton Field. It has little or no relation to the amount of gas that was marketed in December. We already know the actual runs from the

field for December. They were approximately 47,000,000 M.c.f.

It is true that the method of arriving at this allowable for the month of December starts with nominations made by the Pipeline companies themselves, but these pipeline companies have been directed by past practices of this Commission to nominate the full amount that they expect to take from the field this month and each month without regard to past overages and underages. After receiving this nomination this Commission then adds the total net underage for the field, plus the canceled underage and calls that the net allowable for the month. It deviates so far from what the market will absorb that I feel it is not proration as contemplated by the statute. I feel that we have gone as far as we should go in adding to the imbalance of the field.

I have no quarrel with my colleagues or with that portion of the industry that insists on our setting high allowables, but I am fearful that it is a deviation from our duty under the statutes and I want to be on record as having called attention to it and not grasping for or desiring to exceed the jurisdiction granted us by the Legislature.

I, therefore, respectfully dissent.

/s/ Marion Beatty,
Marion Beatty.

APPENDIX B

See page 9 of brief.

Explanation Concerning Appellant's Zero Nomination. (R. Vol. III, p. 280)

By Mr. Stucky:

Q. Mr. Godfrey, with Colorado Interstate indicating to this Commission that it has no requirements for gas from the Kansas Hugoton Field during this six-month period, you would expect your participation in the nominations to be greater than 15.78 percent, would you not?

Mr. Linley: Of the nominations, you mean?

Mr. Stucky: Of the nominations.

Mr. Poe: Right here I want to take exception to the statement of counsel that we indicated to the Commission we had no need for gas from the Hugoton Field for this next period. That is exactly what we did not (T. 161) indicate. We merely stated that under the present practices of the Commission there are sufficient accumulated underages to take care of all of our needs during the next six-month period without the assignment of any current allowable to our wells, and that is precisely why I wanted to get that letter in evidence this morning because I anticipated such a statement as this would be made. The practices of the Commission are known, you have expressed them in an order, and I think that in order to be honest and to take a realistic view of it, we could not have nominated anything other than what we did nominate for the next period.

Commissioner Wiles: The Commission I think understands your position on that, Mr. Poe. However, the question was based strictly on the question of the nominations which have been submitted and, taking your explanation of that, I think he is assuming that your zero nomination is part of the overall nominations. I think the question is proper.

APPENDIX C

See page 11 of Brief.

State Corporation Commission's Comment Concerning "Interim Orders". (R. Vol. III, pp. 229-231)

Chairman Beatty: I for one agree with you on one point at least, and that is that the Commission should as soon as possible get out of this interim order situation (T. 532) and there should be some indication or statement so that everyone will know where we are going. Now, how soon we can do that or whether we can do it, I don't know. We will have to take this whole matter under advisement and the Commission will go into it immediately. In fact, we are going into it tomorrow, if we have time, here with our own staff and start considering what action the Commission can eventually take and what we can figure out (T. 533).

Chairman Beatty: Now, Mr. Stucky, we have been with this ever since we have been on the Commission and Mr. Byrd has been with it longer than that and we hardly expected some of the purchasers to come up with a solution but we were in hopes that you would come up with a specific solution to this problem so we could solve it and everybody live happily ever after, and my reason for asking you these questions a while ago was to see what your solution to this thing is, and the way I summarize it now is that your solution, which is on Pages 17 and 18 of your summation, is that we must quit considering nominations solely and we must take into consideration three other factors which we have just enumerated a few minutes ago, and that you think if we will do that that we will come up with a solution that is approximately 25 percent over and above the takes of last year. Now, that is the way I

interpret your solution to this whole matter that has been running on (T. 538) for a year and a half, and I hope I have it right and we are going to seriously consider it. Now, we have no solution to this. We were looking to you for a solution, and I presume that is your solution and we are seriously going to consider it and I expect that we will have a chance to re-read your summation here and if that isn't all of it I hope we can get all of your solution, but we have been looking to you for a solution and some specific suggestion on what to do here (T. 539).

Chairman Beatty: Gentlemen, we presume that there are no further comments and no further statements to be made in connection with this matter. The Commission is going to take the matter under advisement and the Commission is considering this docket closed, unless for some urgent reason we see fit to open it, and we hope to have some kind of an order within a reasonable time (T. 544).

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 75

COLORADO INTERSTATE GAS COMPANY, APPELLANT

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY

No. 83

NORTHERN NATURAL GAS COMPANY AND CITIES SERVICE GAS COMPANY, APPELLANT

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY

No. 140

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., APPELLANT

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

This memorandum on behalf of the Federal Power Commission, as *amicus curiae*, supports the position

of appellees that these cases do not present a substantial federal question.[1]

Appellants challenge the validity of a series of orders of the Kansas Corporation Commission determining the "allowables", or maximum production quotas, for wells in the Kansas portion of the Hugoton Gas Field. The method of determining allowables employed in these orders differs in certain respects from the method traditionally used by the Kansas Commission prior to May, 1956. It is in fact less restrictive of production. The appellants nonetheless contend that the challenged orders encroach upon the jurisdiction of the Power Commission under the Natural Gas Act. However, inasmuch as the instant orders, unlike the ratable-take orders condemned by this Court in *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas*, 372 U.S. 84, are directed at producers rather than pipelines, and regulate production rather than purchasing, the Power Commission believes that they fall within the sphere of natural gas regulation reserved to the States by Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b). To be sure, an indirect effect of the orders may be to increase the overall pipeline purchases in the Kansas and Hugoton Field. But the orders themselves do not require any such increase or indeed any modification whatever in established purchasing patterns.

[1] We express no opinion on the alternative ground of appellees' motions that the appeals should be dismissed because the State Court's orders rest on adequate non-federal grounds.

Pursuant to its Basic Proration Order for the Hugoton Gas Field (Jur. Statement in No. 83, pp. A 161–A 181), promulgated in 1944 and not in dispute here, the Kansas Commission issues a semi-annual order determining the market demand for natural gas for each of the ensuing six months. The current monthly allowable for the field is determined on the basis of the market demand figure for that month and is spread ratably among all the wells in the field. Each well is required to carry forward its underages (allowables in excess of production) or overages (production in excess of allowables) from prior periods; in any given month the "net allowable" for a well—the volume it is authorized to produce—is the current allowable (the pro rata share of the current field allowable) plus the accumulated underages or minus the accumulated overages of previous periods. When the accumulated underages exceed a certain level (six times the current allowable assigned to the well for the preceding January), the excess is cancelled and redistributed among all the wells in the field; when the accumulated overages exceed that level, the well is temporarily shut in (Jur. Statement in No. 83, A 176–A 177).

Prior to May, 1956 it was the Kansas Commission's practice to base its semi-annual determination of market demand solely upon estimates, or "nominations", by the pipeline companies of the amount they expected to purchase from the field in the following six months. The current monthly allowable was de-

rived from the monthly market demand figure (a) by adding to the latter the amount of any underages cancelled during the preceding month, and (b) by adding to that total the net overage, or subtracting the net underage, recorded by all wells during the preceding month. The figure thus derived was then spread ratably among the wells.

The practical effect of this method was described by the court below as follows (Jur. Statement in No. 83, pp. A 11–A 12):

> This method of calculating the allowables not only tended to hold the allowables to the requirements of the pipeline companies taking the least amount of gas from the field in proportion to which its connected reserves bore to the field as a whole, but prevented increased takes of gas by one company when it acquired new consumer markets unless the other pipelines also wanted to take more gas. If one pipeline company nominated to receive more gas, the extra allowable would be spread among all the wells in the field. If the other pipeline companies continued taking at the old rate, an underage would be created. The following month this underage would be deducted from the market demand to find the current allowable so they would be back where they started. Obviously one pipeline company could not effect any material change in the allowables unless the other pipeline companies went along with it. The pipeline companies did not expand at the same time, when one wanted more gas, the rest could exercise veto power.

These consequences may be illustrated by supposing that three producers, A, B, and C are entitled to equal shares of the gas in a common reservoir. Initially A nominates 30 units and B and C nominate 15 each for the next month. The current allowable for the field would be 60 and each producer would have an allowable of 20. If A produces his full allowable of 20 and B and C their nominations of 15, B's and C's underproduction of 10 (5 each) would be subtracted from the succeeding month's nominations. If these remained unchanged, the new current allowable for the field would be only 50 and the allowable for each purchaser would be reduced to 16⅔. Thus, even if A still has a potential market of 30, his allowable decreases so long as B and C take less than their allowables. Appellants do not question the validity of that method; on the contrary, they urge its reinstatement.

In May 1956, the Kansas Commission began to experiment with its method of determining allowables. The method finally adopted, and reflected in the order here in issue, differs from that used from 1944 to 1956 in two respects. First, the Commission's determination of the market demand for the ensuing six months no longer depends exclusively on the market estimates of the pipeline companies; the Commission also considers evidence of how much the pipelines are purchasing from other sources of supply, the gas sales of all pipelines purchasing from the Kansas-Hugoton Field, and the rate of increase of those sales compared to the rate of increase in withdrawals from

the Kansas portion of the Hugoton Field. More significantly, the overages or underages of the preceding period are no longer added to or subtracted from the market demand figure in computing the current allowable, which, under the present method, is the sum of market demand and cancelled underages.

This method permits pipeline companies, if they choose, to purchase more gas from the Kansas Hugoton field; that is to say, low runs of other companies no longer entail an automatic contraction of the current field allowable. In addition, the change in determining allowables has resulted in a large accumulation of underages, many of which have been cancelled. In December 1963, however, the Kansas Commission entered an order providing that no underages would be cancelled in 1964 and that underages previously cancelled would be reinstated upon application showing that the wells are capable of producing the amounts in question and that the purchaser will take such amounts, provided that the amounts so restored are run within the twelve-month period following reinstatement. (See Jur. Statement in No. 83, p. 30, n. 33.)

2. Appellants claim that the Kansas Commission orders applying the new method of determining market demand and current allowables invade the province of the Federal Power Commission under the Natural Gas Act. They maintain that the orders exert leverage upon them to alter their purchasing patterns so as to take more Kansas Hugoton gas.

Some pipelines, they reason, will be inclined to step up their rate of purchases, thereby "forcing" the appellants to increase their own takes in order to prevent the drainage of reserves by the other purchasers. Moreover, appellants fear that unless their purchases keep pace with the increase in allowables, their accumulated underages will reach the level at which they are subject to cancellation by the Commission, with resultant loss of potential future production. Neither of these objections, in our view, presents a substantial federal question.

(a) The State of Kansas plainly has no duty under federal law to regulate the production of natural gas *at all*, much less to limit production to any particular level (*e.g.*, the level of pipeline nominations). Yet that, in essence, is what the appellants' "drainage" argument comes to. The nub of their complaint is not that the orders in question are unduly restrictive, but that they are not restrictive enough; *i.e.*, they do not sufficiently inhibit other pipelines from taking gas at a rate which threatens to drain the appellants' reserves. Such a protest, we submit, is properly addressed to the Kansas Commission or to the State legislature, but it raises no constitutional issue either under the Supremacy Clause or under the Fourteenth Amendment.

It should be emphasized that the risk of drainage does not result from any affirmative action on the part of the State. It would be more extreme if there were no State controls. Whenever a number of pro-

ducers are withdrawing gas from a common reservoir at unequal rates of production, there is the prospect, rooted in the law of physics, that reserves may migrate from areas of low production to areas of higher output where the level of pressure is apt to be lower. State regulation may in varying degrees tolerate this condition, but in no sense is the condition created or aggravated by the State. Even under the Kansas Commission's traditional method of fixing allowables, which the appellants do not challenge, there was a substantial possibility that wells whose production level was below the field average would incur drainage. Indeed, the only system of regulation calculated to eliminate that possibility altogether would be one which either imposed a uniform rate of production upon all wells in the field or which prescribed as a ceiling for all wells the lowest rate of production achieved by any of them. Appellants do not urge that such drastic regulation is constitutionally mandatory, but neither do they suggest any criteria for determining at what point the amount of probable drainage tolerated by the Commission's orders becomes, for constitutional purposes, excessive.

It may well be that the Commission's new, and more liberal, method of determining allowables would permit a somewhat greater measure of drainage and to that extent make it advantageous for the appellants to increase their purchases in Kansas. But, by the same token, even greater leverage would be exerted

by an order which lifted production controls entirely. The logic of the appellants' argument would thus lead to the extraordinary conclusion that the less restrictive the State's regulation of production becomes, the more it impinges upon the jurisdiction of the Power Commission, and that a State statute which did away with the proration system altogether would represent the maximum encroachment upon the federal domain.

It should be pointed out, finally, that while the orders here challenged may tolerate more drainage within the Kansas portion of the Hugoton Field, one of their declared purposes was to reduce the migration of reserves from the Kansas portion to the Oklahoma portion of the field. Those producers and purchasers (*e.g.*, the appellee Panhandle) whose operations were curtailed by the Commission's former method of determining allowables, and whose reserves were thereby subjected to drainage by Oklahoma wells producing at a higher rate, could make the same objection to the former method that the appellants make to the present method. And whereas the drainage now complained of is not the result of any affirmative action by the Kansas Commission, the migration of Kansas reserves to Oklahoma was attributable, in part at least, to the restrictions imposed by the Kansas Commission. That Commission was not obliged to give greater weight to the interests of the appellants than to those of the appellees.

(b) The appellants' other contention, *i.e.*, that the orders will cause them to lose reserves through the cancellation of underages—is also insubstantial. We note first that the appellants do not question the power of the Kansas Commission to cancel underages; they have challenged neither the Basic Proration Order of 1944, which established the procedure for cancellation, nor any specific cancellation order. Moreover, there seems little basis for arguing that a State commission, in fixing the current production quota for a well, is obligated to make an adjustment for prior underages, *i.e.*, to permit the underproduction of the past to be "made up" by future production in excess of allowables. *A fortiori*, it may place a maximum limit upon the amount of underages which it permits to be carried forward, as the Kansas Commission has done.

The appellants' argument appears to be not that the Commission must refrain from cancelling underages, but that it must determine allowables in such a way that there are no underages to be cancelled. Again, however, the appellants do not insist that the Commission adopt a form of regulation which would rule out underages altogether (*e.g.*, one which limited all wells to the production rate of the least productive well). The State's traditional method of fixing allowables, with which the appellants appear to be content, permitted the accumulation of substantial underages. Yet petitioners offer no explanation as

to why that method was permissible, while the method which replaced it is not.

In any event, even if the "cancellation" issue were otherwise substantial, there would be no occasion for the Court to entertain it at this time. As noted, the Kansas Commission has declared a moratorium upon the further cancellation of underages and has announced that any underages previously canceled will be reinstated under certain conditions (*supra*, p. 6). As yet, therefore, none of the appellants has irrevocably lost any of its underages. Moreover, cancellation does not injure a producer or pipeline unless and until it is in a position to make use of the underages. Only when a pipeline is willing and able to take gas in excess of its current allowables, and has been barred from doing so, can it reasonably claim to have sustained injury by virtue of the cancellation of its underages. There is no assurance that any of the appellants will ever be in that position, or, if they are, that the Kansas Commission, in the exercise of its discretion, will not reinstate cancelled underages as it has in the past. In these circumstances, the argument based upon the threat of cancellation is speculative.

3. Appellants' reliance upon *Northern Natural Gas Co.* v. *State Corporation Commission* is misplaced. That case involved the validity of the Kansas Commission's "ratable-take" orders, which required the pipeline to take from each well the same proportion of that well's allowables as it took from every other

well in the same field. This Court held the order invalid chiefly on the ground that it was directed at the purchasing pipeline, rather than the producers of the gas. 372 U.S. at 90, 92. In addition, the Court stressed the fact that the ratable-take order would have required a readjustment of the purchasing pattern of any pipeline taking unratably and thus could interfere with the Power Commission's functions and affect consumer prices. 372 U.S. at 94.

By contrast, the presently challenged orders setting the production quotas for each well, are addressed solely to the producers, not the pipelines. Moreover, while the ratable-take orders in *Northern required* the pipeline to shift its purchasing patterns and imposed criminal penalties for non-compliance (372 U.S. at 92), the present orders merely *permit* a change in purchasing patterns; they impose no requirement of law. Thus neither of the factors which invalidated the ratable take order in *Northern* is present here.[2]

To be sure, any method of prorationing will have some economic effect upon the operations and pur-

[2] Colorado Interstate (Jurisdictional Statement, p. 24) mistakenly relies on the Federal Power Commission's memorandum in support of the jurisdictional statement in *Northern*. In that memorandum, after outlining the very orders involved here (which had not then been judicially reviewed), the Commission (p. 8) recognized the difference between the permissive allowable orders and the mandatory ratable take orders, stating that the "ratable-take order here involved supplied the element that was missing in the Kansas Commission's previous attempts to force more Kansas gas into the interstate market by merely raising the allowables, or ceilings."

chasing patterns of interstate pipelines. Appellants' approach—that they can show some leverage upon their purchasing practices—would pave the way for the invalidation of all State prorationing and similiar conservation orders, a result clearly inconsistent with the "production and gathering exemption" of the Natural Gas Act and this Court's recognition in the *Northern Natural* case, 372 U.S. at 93–94, that the States' power to conserve and allocate natural gas was not wholly preempted by the Gas Act.

4. Colorado Interstate, alone among the appellant pipelines, has contracts requiring it either to take or to pay for all allowables set by the Kansas Commission. Seeking to lift itself by its bootstraps, it urges (Jurisdictional Statement, p. 24) that the Kansas orders are invalid because they make it "probable that it may have to pay for gas which it does not currently purchase and may never be able to purchase." Any method of prorationing, however, would subject a purchaser to the risk that it might not be in a position to take all of the allowables available to it and that, under a contractual undertaking to do so, it might be required to pay for gas not taken. The mere fact that a pipeline has bound itself by contract to purchase the maximum amount of gas permitted by State regulation does not convert a permissive proration order into a mandatory one. Nor can such a contract provision exempt the pipeline from otherwise valid State regulation. Thus, if, as we believe, the Kansas

orders do not otherwise impinge upon the regulatory function of the Power Commission, the existence of the take-or-pay provisions does not alter the result.[3]

For the foregoing reasons, it is the view of the Federal Power Commission that the Kansas orders here in issue do not invade the domain of federal regulation or give rise to a substantial federal question.

Respectfully submitted,

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OCTOBER 1964.

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[3] If the type of take-or-pay provisions Colorado Interstate has in its contract operates contrary to the public interest, the proper solution would appear to be for Colorado Interstate or its customers to seek to have the Power Commission exercise its authority under Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), to order the contracts reformed.

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No. 75

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

COLORADO INTERSTATE GAS COMPANY,
a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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It would appear that we have an added burden. The very federal agency that should be concerned with the federal functions under the commerce clause and the Natural Gas Act signifies in its Memorandum filed herein

that there is no substantial federal question involved in our appeals. Our adversaries pitched the main thrust of their motions on the premise that the decisions below rested on adequate non-federal grounds. In our brief opposing Appellees' motions we demonstrated that the Kansas Supreme Court directly recognized and inescapably determined our posed federal questions.

Herein we will demonstrate, this time with particular attention to the Federal Power Commission's Memorandum, that the federal questions we raise are present and are substantial.

We are not here urging that this Court demolish state conservation and proration. We do urge that this Court make it very clear that the states must stay within recognized concepts of conservation and proration. The instant orders just do not fall within the recognized ambit of legitimate state function. They are concerned with volumes of gas sold; they are not concerned with conservation, but rather with exploitation. They represent an attempt, in an effort to obtain a greater share of the national consumer demand for gas, to license one pipe line purchaser to divert reserves dedicated to one consumer market under Federal Power Commission certificates, to another consumer market.

No state under our Constitution can determine for itself what share of the consumptive demand for gas in all the states should be served by the sources of supply in that particular state. Obviously, if this were not so each state would serve its own selfish ends to the detriment of the whole of these United States. It simply is not an area where the states can practicably regulate. Therefore, the federal Constitution and laws must prevail and the instant state orders must fail. Our appeals fall directly

within the principle expounded by this Court in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 81 S.Ct. 435, 5 L.Ed.2d 377 (1961):

> "* * * Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. Compare Guss v. Utah Labor Relations Board, 353 U.S. 1, 1 L.Ed.2d 601, 77 S.Ct. 598, 609. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs." (365 U.S. at 19-20).

Actually, instant orders are merely another tack of the grasp for dollars for local interests exhibited by the Kansas Corporation Commission, beginning with its unsuccessful attempt to fix prices, as in *Cities Service Gas Company* v. *State Corporation Commission*, 355 U.S. 391, 78 S.Ct. 381, 2 L.Ed.2d 355 (1958), and extending to its ill-fated try at requiring purchasers to purchase ratably, as in *Northern Natural Gas Company* v. *State Corporation Commission*, 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963). Here the thrust of the orders from which we appeal is with volumes of gas, with the market for gas, and stated most succinctly with the avowed purpose of the Commission to obtain greater runs of the Kansas Hugoton gas to supply the national markets.

This is not the first time the Federal Power Commission has been dead wrong. At times its views have differred the whole 180° from the pronouncements of this Court, as in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954), and the views

expressed by the Federal Power Commission in its brief on the merits in the *Northern* case, *supra*. Equally important the views of the Federal Power Commission expressed in the Memorandum herein differ diametrically from those expressed by it before this court in *Transcontinental*, *supra*. There the Federal Power Commission carefully sought to protect the consuming public from higher prices which could and did obtain in a sellers' market. But in our appeals we have the anomaly of state orders which seek to and do create a sellers' market even though there is an excess of supply. Appellant, to protect its own reserves (if instant orders are to prevail), must purchase more Kansas Hugoton gas. Such orders place Appellant under most stringent economic compulsion. Its alternatives are to lose its reserves dedicated to its interstate markets or to purchase more Kansas Hugoton gas despite the disturbing effect on its purchasing patterns, the heating value of its gas, its plans and its facilities, all to the detriment of the ultimate consumer.

We will proceed to discuss the Federal Power Commission's Memorandum and will demonstrate that, regardless of the assertions therein, there are in our present appeals substantial federal questions which this Court should answer.

I.

In its Memorandum the Federal Power Commission first contends that the orders issued by the Kansas Corporation Commission which form the subject matter of our appeals are unlike the ratable take orders condemned by this Court in *Northern Natural Gas Company* v. *State Corporation Commission of Kansas*, 372 U.S. 84, in that the orders are directed at producers while the orders in the *Northern* case were directed at purchasers. Unless we

are to exalt form at the expense of substance, this contention has no merit. True, in *Northern* the purchasers were named, directed and affected by the orders. In the instant cases the orders are directed at and affect the purchasers. They have to be so directed and intended because otherwise the Kansas Corporation Commission's purposes could not be realized. No gas is produced which is not purchased. Does the mere naming of the purchaser as in *Northern* make a substantial federal question? Is the naming of the purchasers the sole operative jurisdictional fact? The direction of the orders, their impact, is the same—as the purchasers. This is inescapably true by the very nature of the orders and the inescapable facts of life of the business of obtaining gas and supplying it to consumers. The orders in the instant appeals determine the market demand, the amount of gas that should be purchased in the Kansas Hugoton Field. This is the concern of the purchasers. If any purchaser is not able to run through its interstate pipe lines the amount of gas which the other purchasers are running, it is the purchaser who loses a part of its reserve dedicated to its interstate market. To protect against such loss of reserves it is the purchaser which must change its purchasing patterns to enable it to safeguard its reserves in the Kansas Hugoton Field and not lose them to some other purchaser with a different consumer market. The impact of the orders is, therefore, inescapably on the purchasers. The orders are directed to the producers "and other interested parties having a right to withdraw gas." (Appendix to Colorado Interstate Gas Company's Jurisdictional Statement, p. 115.) The real parties in interest are the purchasers who are parties with a right to withdraw gas.

We have heretofore pointed out to this Court that the orders involved in the instant appeals were made by the Corporation Commission of Kansas as a result of joint dockets, the first dealing with the determination of market demand, *i.e.*, the amount of gas which such Commission felt should be purchased in the Kansas Hugoton Field, which notices were directed at both purchasers and producers. The response to such market demand notices has been traditionally (and must be practicably) made by the purchasers since they are the market for Kansas Hugoton Gas and are, therefore, the only ones who can supply the necessary estimates. The second dealt with Orders to Show Cause why the purchasers should not be required to take ratably from the various wells in the Kansas Hugoton Field.* These were directed at the purchasers alone, in an admitted effort, *i.e.*, admitted by the Commission, to obtain more purchases of Kansas Hugoton gas to achieve what such Commission felt was the fair share of the consumers' market for gas in the United States to be supplied from the Kansas Hugoton Field. The thrust of such orders was concerned inextricably with volumes of purchases. This Court is well aware that the jurisdiction of any state commission does not extend to prices or volumes of purchases and it is equally well aware that it must determine the impact of the orders and not whether they nominally relate to something else. If the impact of the orders relates to prices or volumes of purchases, it is outside the state ambit of authority. Thus this Court stated in *Northern*, supra, at 372 U.S. 90-91.

> "* * * But our inquiry is not at an end because the orders do not deal in terms with prices or volumes of purchases * * * The Natural Gas Act precludes not

*See Appendix to Colorado Interstate Gas Company's Jurisdictional Statement, pp. 120-123

> merely direct regulation by the States of such contractual matters. * * * The Congress enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce, whether by a pipe line company or not and whether occurring before, during, or after transmission by an interstate pipeline company'."

The substantial Federal questions herein involved do not relate to production and gathering, exempted under the Natural Gas Act. The activities which fall within such exemption have long since occurred before we reach the problems presented in these appeals. The producer, under his lease, had the right to explore for gas. He did explore and obtained gas and sold it under a long term purchase contract filed with the Federal Power Commission. After the connection of such well with such interstate pipe line purchaser, the producer's job was done, with the possible exception of reworking his well if it would not produce into the pipe line purchaser's line. Our concern is with the market demand, with the volume of gas to be purchased. It is the pipe line purchaser who supplies the market for the gas produced from such wells so obtained pursuant to leases. It must see to it that the correct amount of gas is introduced into the pipe line at its purchasing end to balance the gas sold at the other end of the pipe line where it is distributed to consumers. This Court in its *Northern* decision, 372 U.S. 92, made reference to shifting to the shoulders of the pipe line purchasers the burden of the balancing of the input. As a matter of fact, this burden is with the purchasing companies and has always been with the purchasing companies. The purchasing company must determine the amount of gas which is introduced into its lines and of course this amount must coincide with the gas it sells at wholesale at the other end of the line.

II.

In its memorandum the Federal Power Commission does recognize the facts as we set forth heretofore for this Court—the State Corporation Commission of Kansas has changed its method and its aim in the Kansas Hugoton Field.

Prior to the instant orders it allocated under a proration formula the amount of gas actually marketed, on an equitable basis to all the wells in the common source of supply, i.e., the Kansas Hugoton Field. In the instant orders before this Court on appeal, it has not allocated the actual gas marketed but has sought to tamper with the volumes to be purchased and has, therefore, allocated some fictitious figure greatly in excess of the actual gas marketed. This has caused huge underages to arise. The Federal Power Commission suggests, with an over-simplified illustration, that prior to the orders before this Court in the instant cases, the Commission used as its guide the amount of gas desired from the Kansas Hugoton Field by the pipe line purchaser with the least demand and contends that under the instant orders the Commission has merely changed the criterion to the pipe line purchaser with the greatest demand. Neither suggestion is correct.

Proration entails an equitable allocation of the market demand furnished by all the pipe line purchasers to all the wells in the common source of supply.* Whatever the demand is, in the aggregate, by the pipe line purchasers, such quantity is allocated under a proper proration formula to all the wells. This does not mean that any given pipe line purchaser can satisfy its demands from its own con-

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*This is market demand proration and the only type involved in these appeals. Other types, perhaps available, have not been tried by the Kansas Corporation Commission

nected wells since its demand may or may not coincide with the quantity of gas available from its own connections. It may be over-connected or under-connected. It does mean that its demands can be satisfied from the Field as a whole. If it desires more gas from the Field, it is available in the Field from some pipe line purchaser who is under-produced since its connections are greater than its demand. This is proration and has been so recognized by all the states which have passed gas conservation acts and has been recognized by this and other courts repeatedly.*

Proration (which is nothing more than an equitable allocation of the total demands of the market to all the wells in the common source of supply) works since a purchaser with a greater demand than the supply available from its own connections will find another purchaser with a demand less than the supply available from its connections. Thus we have a prospective purchaser and seller among the purchasers.

This can not obtain under the orders from which we appeal. The Kansas Corporation Commission has tampered with volumes of purchases and is allowing the purchaser

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*Thus, if A, B and C are pipe line purchasers, if A desires 30 units, while B and C desire only 15 units each, the aggregate desire for gas available to be produced is 60 units. If the connections of each of the pipe line purchasers are equal, each would be entitled to 20 units from the 60 units which are made available under a proration formula. If A produces his full allowable of 20 units and B and C produce only their demand of 15 units each, thus causing an under-production of 5 units each or 10 units in the aggregate, the 10 units will be subtracted from the next month's current allowable because the 10 units are already gas available to be produced. A can obtain his demand from the Field but not from his own connections. To obtain his desires under proration from the Field, A must deal with those companies who have an over-supply, i. e., with B and C

with the greatest demand and the under-supply (*i.e.*, under-connected) to obtain its entire demand from its own wells, thus doing away with this prospective purchaser and seller among the purchasers. This just is not proration. To allow one purchaser to obtain more than its fair share of the reserves from its own connections in a common source of supply by virtue of a gas conservation act enacted by any state is unlawful. The state, if it desires to pass a gas conservation act, must do so with the legitimate aim of preventing waste and protecting correlative rights. If its order does not reasonably achieve these ends, it is outside the state ambit. This Court so determined in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 57 S. Ct. 364, 81 L. Ed. 510 (1937).

Under the orders herein a purchasing company is given a state license to divert reserves of another pipe line purchaser with a lesser demand to itself, unless such pipe line purchaser with the lesser demand, having been denied the opportunity to sell its underage within the Field, changes its purchasing patterns and protects itself by taking proportionately the same quantity of gas from the Kansas Hugoton Field as the pipe line purchaser with the greatest demand.

It is no answer to suggest, as the Federal Power Commission does, that the state does not have to pass any gas conservation act at all. Without such an act, the rule of capture prevails and anyone may produce whatever he can obtain through his own wellbore. The only protection others have is the right of self-protection, *i.e.*, to obtain all they can produce through their own wellbores. The point is that although the state does not have to pass any gas conservation act, if it does, it must pass one that meets the standards prescribed by our Constitution and our fed-

eral laws. Such Constitution and laws prescribe that the state is without authority in the field of gas except to deal with production and gathering as exempted from the Natural Gas Act and to deal in this area only reasonably to prevent waste and to protect correlative rights. Herein our problems concern the volumes of purchases, which do not fall within the exception. Herein the state act as carried forward in instant orders does not deal with proration and therefore is beyond the state's authority. Therefore, whether looked upon on one side or the other of the coin, the orders herein must fail as violative of the federal Constitution and laws.

Admittedly, there is drainage within the Kansas Hugoton Field and such drainage is toward the producer taking more than its share of the gas reserves. Such result cannot lawfully obtain as not *Thompson* v. *Consolidated Gas Utilities Corp., supra.* This Court in *Northern, supra,* determined that Kansas could not with a ratable take order seek to increase the gas purchases in the Kansas Hugoton Field. In commenting thereon, Meyers, in 77 *Harvard Law Review*, 689, at 699, observed

> "That the Natural Gas Act forbids state action seeking to increase its share of the market at the expense of other states is a tenable and much narrower proposition than that (or those) discernible from the opinion as written. Indeed the commerce clause of the Constitution would seem to forbid such action by a state."

Seven years earlier Chief Judge Murrah of the United States Court of Appeals, Tenth Circuit, stated concerning the same question (albeit in relation to an order for oil rather than gas) in *Gulf Oil Corp.* v. *Corporation Commission of Oklahoma*, 147 F. Supp. 640, U.S.D.C., W.D. Okla. (1956) (in a three judge proceeding where the ma-

jority invoked the doctrine of abstention), where Oklahoma sought to increase Gulf's oil purchases in Oklahoma, 147 F. Supp. at 649,

> "* * * The net result of all of this is a coercive, even though laudable, attempt to preserve Oklahoma's market for its crude oil in competition with other states. The undisputed evidence is that if Gulf is required to take the full allowable, it must do one or all of four things. First, it may withdraw completely from the state with obvious disastrous consequences; second, reduce the number of leases from which it purchases in Oklahoma; third, it may curtail its repurchases of Oklahoma crude with consequent adverse impact upon free interstate trade in oil; or, fourth, it may curtail its interstate purchases elsewhere in order to accommodate the purchase of Oklahoma allowables. To me, any alternative is to impose a restriction upon interstate commerce for the economic advantage of the State of Oklahoma. If Oklahoma can enforce its order to take more oil for interstate markets than the market demand therefor, other competing states can do likewise with chaotic and disruptive consequences to interstate commerce."

III.

It is suggested by the Federal Power Commission that the federal question herein presented is not substantial since no pipe line purchaser is yet hurt. This is a surprising assertion since if the pipe line purchasers waited and acquiesced in the orders of the Kansas Commission until they actually had lost a portion of their reserves dedicated to their interstate markets, they would, in all likelihood, have waived any right to complain. We take it, however, that the real thrust of the Federal Power Commission's contention is that the Kansas State Corporation Commission has entered a moratorium for a year in can-

celing underages. This moratorium was indeed ordered by the Kansas Commission upon a showing that such underage could reasonably be run within such one year period. In fact the Commission has presently determined to look again and see if the moratorium should not be increased for an additional year. The moratorium is not substantive. It does not run any gas. It only postpones the time when reserves will be lost by one pipe line purchaser and such reserves transmitted to the consumers of another pipe line purchaser. Indeed so long as the Kansas Commission determines how much gas should be marketed from the Kansas Hugoton Field, *i.e.*, so long as it determines the volumes to be purchased and allocates this figure to the wells in the field, as it has been, and is now, doing, the underages which have developed cannot be run. This is inescapably so since the gas available for production under the Commission's current formula is more than will be marketed and there is no room left in either pipe lines or markets to run the vast accumulated underages which have increased, since the record that is bfore this Court was made, to well in excess of 275,000,000,000 cubic feet.

The federal question which we submit is substantial now prevails. The orders of which we complain seek to set volumes of purchases. Under such ordefs a pipe line purchaser's only method for holding onto its dedicated reserves for its own consumers is to change its purchasing patterns and match proportionately the production from the Kansas Hugoton Field of the purchaser with the greatest demand therefrom. This disrupts the purchasing patterns, disrupts the balance of Colorado Interstate in the BTU content of its gas, disrupts its plans and its price structure—all necessarily so. No moratorium can erase this reality. The problem is real, the problem is now.

IV.

Lastly, the Federal Power Commission urges that as to this Appellant, which has the only take or pay for contracts in the Kansas Hugoton Field, there is some other magic remedy to offset the loss of reserves, the tampering with purchasing patterns, and the complexities upon which price must be based. It suggests that the leverage of the present orders of the Commission on Colorado Interstate because of its take or pay for contracts can be eliminated by virtue of a proceeding before the Federal Power Commission under Sec. 5A of the *Natural Gas Act*, 15 U.S.C. 717d(a), to reform such contracts and remove the take or pay for provisions.*

There has never been such a proceeding. There is nothing in the statute which even suggests such a possibility. How such position can be advocated by the Federal Power Commission when it is so far out, so far reach-

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*§ 717d. Fixing rates and charges; determination of cost of production or transportation.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance wth a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rate.

ing and entails so much stretch, at the same time and in the same memorandum where it can not recognize a very direct encroachment upon its responsibilities is beyond us. Neither the Federal Power Commission nor this Court conjured up such a remedy in *Northern*, *supra*. This Court there found a contractual provision with the alternatives available to a pipe line purchaser sufficient to invoke its appellate jurisdiction, stating, 372 U.S. at 89,

> "* * * These orders presented the appellant with the alternatives of complying with the obligations of the Republic contract and increasing its takes from the other producers' wells—thus taking more gas from Kansas than it could currently use—or of risking liability for a breach of the Republic contract by decreasing its takes from the Republic wells below the allowables."

We submit that the arguments advanced by the Federal Power Commission to support its assertion that our federal questions are not substantial, are transparent, fallacious and illogical. We have examined them one by one and have demonstrated that our federal questions are indeed substantial, are real, and require the action of this Court.

Respectfully submitted,

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Nos. 75, 83, 140

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

COLORADO INTERSTATE GAS COMPANY, *Appellant*,
vs.
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

NORTHERN NATURAL GAS COMPANY AND CITIES SERVICE GAS COMPANY, *Appellants*,
vs.
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Appellant*,
vs.
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

RESPONSE OF APPELLEES STATE CORPORATION COMMISSION OF THE STATE OF KANSAS AND SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

*E. EDWARD JOHNSON, *General Counsel for State Corporation Commission of Kansas*,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 75

COLORADO INTERSTATE GAS COMPANY, *Appellant*,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

No. 83

NORTHERN NATURAL GAS COMPANY AND CITIES SERVICE GAS COMPANY, *Appellants*,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

No. 140

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Appellant*,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

RESPONSE OF APPELLEES STATE CORPORATION COMMISSION OF THE STATE OF KANSAS AND SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

The Solicitor General of the United States in his Memorandum on behalf of the Federal Power Commission as *amicus curiae* states the cases should be dismissed.

This response is for the purpose of stating that the responding appellees are not only necessarily in accord with this ultimate conclusion, but also agree with the expressed rationale leading to this position.

The Solicitor General's careful analysis of the facts is a refreshing contrast to appellants' many statements which are both inaccurate and unsupported in the record.

The Memorandum completely destroys appellants' suggestions that the Kansas judicial and regulatory authorities are joined together in a conscious conspiracy designed to transgress federal jurisdiction.

Appellants' prolonged efforts to carve out a new regulatory no-man's-land under the pious guise of defending federal regulation, typified by such *ad hominem* arguments, are now fully exposed.

We respectfully submit that these appeals should be dismissed so that state and federal regulation can cooperatively proceed after eight years of hearings and litigation.

Respectfully submitted,

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November, 1961

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